Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JEFFREY NIELSEN,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO-CLC; AND MERCY AMBULANCE OF FORT WAYNE, INC.

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), this Court held that employees covered by the National Labor Relations Act are free to resign from union membership at will, in accordance with the policy of "voluntary unionism" embedded in the Act. In *CWA v. Beck*, 487 U.S. 735 (1988), this Court held that objecting nonmembers have a statutory right to halt the use of their compelled dues for unions' political, ideological and non-representational activities.

The question presented is:

Can a union enforce a *Beck* "waiting period," which requires employees who resign from union membership to wait for as long as one year before the union will accept *Beck* objections and stop charging them for political causes and candidates they abhor?

PARTIES TO THE PROCEEDINGS BELOW

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Jeffrey Nielsen respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 5, 1996.

OPINIONS BELOW

The court of appeals' unreported Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc appears in Appendix ("App.") A, 1a, *infra*. The panel opinion (App. B, 3a) is officially reported at 94 F.3d 1107 (7th Cir. 1996). The decisions of the district court (App. C & D, 25a and 50a) are officially reported at 895 F. Supp. 1103 and 895 F. Supp. 1093 (N.D. Ind. 1995).

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on September 5, 1996. A Petition for Rehearing and Suggestion for Rehearing *en banc* was timely filed on September 18, 1996, and denied by Order of the Court of Appeals dated September 30, 1996. By Order dated December 10, 1996, Justice John Paul Stevens granted an Application for a 30-day extension of time in which to file this Petition, up to and including January 28, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, which are involved in this case, are 29 U.S.C. §§ 157 and 158(a)(3) and 158(b)(1)(A). In pertinent part, these statutes state:

> § 157. **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> § 158. **Unfair labor practices**
>
> **(a) Unfair labor practices for an employer**
>
> It shall be an unfair labor practice for an employer—
>
> **(3)** by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in labor any organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any

action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such employment or the effective date of such agreement, whichever is the later.

(b) Unfair labor practices by labor organization
It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title:...

STATEMENT OF THE CASE

Petitioner Jeffrey Nielsen ("Nielsen") filed this case in the United States District Court for the Northern District of Indiana on November 15, 1994. He invoked the jurisdiction of that court under 28 U.S.C. §§1331 and 1337, and § 301 of the NLRA, 29 U.S.C. §185.

Nielsen has been employed as a paramedic by Mercy Ambulance of Fort Wayne, Inc. ("Mercy Ambulance") since February, 1992. He is employed within a bargaining unit represented by Local Lodge 2569 of the International Association of Machinists and Aerospace Workers ("Local 2569"). Mercy Ambulance and Local 2569 entered into a collective bargaining agreement governing Nielsen's bargaining unit, which states, in pertinent part:

> Section 1. Agency Shop:
> As a condition of continued employment, all employees included within the unit described in Article II of this Agreement shall either become a member of the Union and pay dues thereto, or in lieu thereof, shall pay an amount equal to the Union's initiation fee and shall thereafter pay to the Union each month, either directly or through payroll deduction, an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union.

Shortly after being hired by Mercy Ambulance, Nielsen joined the International Association of Machinists and Aerospace

Workers ("IAM International") and its Local 2569. He remained a member for well over two years.

On July 5, 1994, Nielsen changed his status. He mailed the union a letter resigning from membership, citing *Pattern Makers v. NLRB*, 473 U.S. 95 (1985). In that same letter, Nielsen simultaneously invoked his right—as a new nonmember—to pay only reduced "financial core" fees pursuant to *CWA v. Beck*, 487 U.S. 735 (1988). (This letter is reproduced at App. E, 69a).

On July 22, 1994, the president of Local 2569 informed Nielsen by letter that his resignation was "accepted." However, the letter also stated that Local 2569 "is in no position to act upon your request to become a fee objector." The letter said: "If you wish to pursue this matter further, I suggest you take the matter up with the General Secretary-Treasurer directly," referring to the General Secretary-Treasurer of the IAM International. Enclosed with the letter was a copy of a "Notice to Employees Subject to Union Security Clauses" ("Notice") issued by the IAM International. That Notice referred to a 30-day "window period," in January, as the only time during which the IAM International will accept employees' objections and requests to pay the reduced representation fees permitted by *CWA v. Beck*. (Local 2569's letter is reproduced at App. F, 70a).

The IAM International reprints the Notice once a year in a single issue of its monthly newspaper, "The Machinist." (Pursuant to Supreme Court Rule 32, Nielsen has lodged ten copies of the December 1993 and November 1994 issues of "The Machinist" with the Clerk. These issues have been reproduced at their original 16 ¼ x 11 ½ sizes. The Notice can be found on page 7 of both issues, respectively.)

As is readily apparent, the Notice is typed in fine print and placed at the end of "The Machinist." Nothing on the cover of either issue indicates that it contains a legal notice affecting the rights of nonmembers. While the IAM International mails monthly issues of "The Machinist" to all represented employees, Nielsen does not recall ever seeing the "Notice" printed in it. (Supplemental Declaration of Jeffrey Nielsen in Opposition to the Unions' Motion for Summary Judgment, page 3).

Perhaps most important, "The Machinist" is loaded with political and ideological commentary and propaganda. That is precisely the conduct that led Nielsen, in the first place, to resign from membership in the IAM unions and claim his rights under *CWA v. Beck*. For instance, page 1 of the December 1993 issue concerns the IAM's role in the political battle over the North American Free Trade Agreement (NAFTA). Page 2 is a list of each congressman's vote on NAFTA. Page 3 extols IAM activities at Bath Iron Works in Maine, and at United Air Lines and USAir. Page 4 describes an IAM Communications Conference focused on such political activities as "health care reform," passing the "Workplace Fairness" bill and defeating NAFTA. Page 5 contains an article about the IAM's fight with former Continental Airlines Chairman Frank Lorenzo. Buried under this mass of political and ideological commentary was the Notice, in fine print, on page 7.

On August 16, 1994, Nielsen wrote to Donald E. Wharton, General Secretary-Treasurer of the IAM International, stating:

> I have just resigned from the IAM and its Local 2569. I sent my objection letter to the Local union simultaneously with my resignation letter, but I was referred to you!
>
> I hereby notify you that I wish to be a "financial core objector" only, in accordance with the Supreme Court's decision in *CWA v. Beck*, 108 S. Ct. 2641 (1988).
>
> I object to the collection, as well as the use, of any of my money for any purposes other than paying my pro rata share of your direct expenses for fulfilling your limited statutory duty under § 9 (a) of the NLRA to engage in collective bargaining, contract administration and grievance processing for the unit of employees at in [sic] which I am employed.

(Emphasis in original; this letter is reproduced at App. G, 72a-73a).

On August 24, 1994, IAM International's General Secretary-Treasurer, Donald E. Wharton, responded with a form letter. It stated:

> We must advise that your objection was not properly perfected under the guidelines set forth in the Official Notice in the December, 1993 issue of "The Machinist."
>
> ***
>
> /X/ Your request that your monthly payment be reduced was not postmarked or received during the appropriate 30 day period.

(This form letter is reproduced at App. H, 74a-75a).

Notwithstanding their immediate acceptance of Nielsen's resignation (an act required by this Court's decision in *Pattern Makers*), both Local 2569 and the IAM International refused to accept his simultaneous objection under *CWA v. Beck*, because of the strictures of the "waiting period." The IAM unions continued to collect and spend full union dues from Nielsen, though admitting that 20.92% of the IAM International dues were spent for political, ideological and non-representational activities he abhorred. (Plaintiff's First Set of Requests for Admissions). Thus, Nielsen was required to subsidize the IAM's political agenda for over five months, until the next annual "window period" occurred.

Nielsen filed this lawsuit to challenge the power of the IAM unions to enforce internal "waiting periods," which required him to fund causes and candidates he abhors, even after he twice submitted objection letters.[1]

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[1] Nielsen's lawsuit also challenged the facial validity of the union security language, and the union's power to negotiate, administer and enforce that language, since it overstates the lawful limits of what can be required as a condition of employment under *CWA v. Beck*. *Compare Bloom v. NLRB*, 30 F.3d 1001, 1003-05 (8th Cir. 1994) and *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995) *with International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994) and the Seventh Circuit's opinion herein, App B, 3a. Nielsen is not pursuing this issue. Similarly, Nielsen is not raising the issue of the federal court's jurisdiction over Mercy Ambulance.

After limited discovery, Nielsen and the unions agreed that there were no material facts in dispute. They filed cross-motions for summary judgment in April and May, 1995. Mercy Ambulance moved to dismiss under F. R. Civ. P. 12(b)(1) and (6). On June 21, 1995, the district court granted the unions' motion for summary judgment and Mercy Ambulance's motion to dismiss. A timely notice of appeal was filed, and on September 5, 1996, a panel of the Court of Appeals for the Seventh Circuit affirmed.

The court of appeals upheld the unions' "waiting period" policy. It believed that the IAM, an international union with an annual budget of over $71 million, would be subject to too much of an "administrative burden" if it were required to accept Nielsen's *Beck* objection simultaneously with his resignation from membership. (App. B, 20a-23a).

The court of appeals never mentioned this Court's decision in *Pattern Makers*, or its holding that employees have an unfettered right to resign from union membership at will, in accordance with the policy of "voluntary unionism." *Pattern Makers*, 473 U.S. at 105. According to the court of appeals, "Nothing in the NLRA or *Beck* confers a right to instantaneous action...." (App. B, 22a).

However, the IAM's policy does not merely fail to provide "instantaneous action," in violation of the spirit of *Pattern Makers*. It condemns the nonmember employee to continue funding political causes and candidates he abhors for as long as one year after his objection is made, until the next "window period" arrives. (App. B, at 20-23a). This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT HAS LONG HELD "VOLUNTARY UNIONISM" TO BE THE POLICY OF THE NATIONAL LABOR RELATIONS ACT WITH REGARD TO AN INDIVIDUAL EMPLOYEE'S RIGHT TO JOIN, OR RESIGN FROM, A UNION. THE COURT OF APPEALS FAILED TO RECOGNIZE THIS BEDROCK POLICY WHEN IT UPHELD AN INTERNAL UNION "WAITING PERIOD" THAT FORCES UNION MEMBERS EXERCISING THEIR STATUTORY RIGHT TO RESIGN TO NEVERTHELESS CONTINUE FUNDING, FOR UP TO ONE YEAR, POLITICAL ACTIVITIES WHICH THEY ABHOR.

A. INTRODUCTION.

This case is exceptionally important because the court of appeals' decision nullifies the right of union members to resign their memberships at will and simultaneously halt the use of their money for political candidates and causes which they abhor. See *CWA v. Beck*, 487 U.S. 735 (1988). The internal union policy upheld by the court of appeals permits the union to ignore *Beck* objections, and forces objecting employees to pay dues that will admittedly be used for political activities. This is compelled political speech at its worst! *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Elrod v. Burns*, 427 U.S. 347 (1976).

This is not a case where an employee kept silent about his objections, and his "dissent [could not] be presumed." *Machinists v. Street*, 367 U.S. 740, 774 (1961). To the contrary, Nielsen dissented twice, in writing, but the unions continued collecting and spending his dues money to further their political agenda. The court of appeals decision licenses unions to ignore workers' "dissent," and blatantly compels political speech.

Because Nielsen was required to subsidize political candidates and causes he abhors, notwithstanding his two objection letters, the court of appeals contravened this Court's

many rulings that the "agency shop" is unlawful where the compulsory dues are used "to force employees to contribute, albeit indirectly, to the promotion of [social, political and ideological] positions." *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 516 (1991); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294 (1986) (union may not "collect from dissenting employees any sums for the support of ideological causes not germane to its duties as a collective bargaining agent"); *Ellis v. BRAC*, 466 U.S. 435, 447 (1984); *CWA v. Beck*, 487 U.S. 735 (1988). The court of appeals also ignored key principles of this Court's decisions in *Pattern Makers v. NLRB*, 473 U.S. 95, 105-07 (1985) and *Machinists v. Street*, 367 U.S. 740, 771 (1961), both of which protect employees' right to withdraw support from the union at will.

In short, the court of appeals' decision gravely undermines the policies of "voluntary unionism" and free speech for individual employees which are at the heart of federal labor policy, by forcing untold thousands of employees—if not millions of them—to financially support political causes and candidates they abhor, even after they resign from union membership and voice their objections.[2] "By allowing the union shop at all, [this Court has] already countenanced a significant impingement on First Amendment rights." *Ellis v. BRAC*, 466 U.S. 435, 455-56 (1984). The Court is now asked to stop an even greater

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[2] The instant case concerns one employee who resigned from union membership and tried to simultaneously halt the use of his compulsory dues for political causes and candidates he opposes. Undeniably, however, the court of appeals' decision limiting the right to resign and simultaneously object affects thousands of union members who also disagree with how their unions are spending compulsory dues for political causes and candidates. *See AFL-CIO Endorses Clinton, Approves $35 Million Political Program*, Washington Post, March 26, 1996; *What Union Members Think*, Washington Times, May 1, 1996 (poll by Luntz Research reveals that 40% of union members vote for Republicans and 62% of union members oppose the use of their funds for the AFL-CIO's political campaigns). Indeed, hundreds of employees like Nielsen have filed unfair labor practice charges with the NLRB against the IAM unions over this conduct. *See, e.g., California Saw & Knife Works*, 320 N.L.R.B. No. 11 (1996).

impingement from being foisted upon employees—one that *compels* them to support political candidates and causes they abhor.

B. THE POLICY OF THE NLRA IS "VOLUNTARY UNIONISM."

In *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), this Court held that the National Labor Relations Act guarantees union members the right to resign at will. The union in *Pattern Makers* argued that its strongest weapon—the strike—would be imperilled if employees were free to immediately resign whenever they chose. Nevertheless, this Court held that the policy of "voluntary unionism" is embedded in the NLRA itself, and that this policy of individual freedom overrides contrary union interests, no matter how basic or strong they may appear. *Id.* at 104-08; *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original) ("By its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.") The basic teaching of *Pattern Makers* is, therefore, that employees' resignations must be given immediate effect by the union.[3]

After *Pattern Makers*, this Court held that employees, on becoming (or remaining) nonmembers, have another right based upon the policies of "voluntary unionism" and free speech: the right to prevent their dues from being used to support political causes and candidates they abhor. *CWA v. Beck*, 487 U.S. 735 (1988). This Court did not equivocate when it stopped unions from forcing nonmembers to fund objectionable political causes and candidates.

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[3] Subsequent decisions of the lower courts and the National Labor Relations Board have uniformly applied this policy of "voluntary unionism" to protect the right of individual union members to resign at will. *NLRB v. Local 73, Sheet Metal Workers*, 840 F.2d 501 (7th Cir. 1988) (any union rules limiting the right to resign are unlawful); *NLRB v. Local 54, Hotel & Restaurant Employees Int'l. Union*, 887 F.2d 28 (3d Cir. 1989); *United Auto Workers v. NLRB*, 865 F.2d 791 (6th Cir 1989); *Professional Ass'n. of Golf Officials*, 317 N.L.R.B. 774 (1995).

> The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration and grievance adjustment. We think it does not.

Id. U.S. at 745. The Court did not say "we think it does not, *except that the union can unilaterally delay the effective date for up to one year.*" To the contrary, the Court has been clear for decades: once an employee meets his minimal "burden" of objecting, *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986), the union must immediately cease charging him for its political causes and candidates. As the Court said in *Machinists v. Street*, 367 U.S. at 771, emphasis added:

> The appellees who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were *without power* to use payments thereafter tendered by them for such political causes.

The court of appeals held that "[n]othing in the NLRA or *Beck* confers a right to instantaneous action ... [on nonmembers who want to stop supporting political causes they abhor]." (App. B, at 22a). However, with regard to resigning from union membership and objecting to union political action, this Court has specifically ruled that employees are entitled to "instantaneous action." "By allowing employees to resign *at any time*, § 8(a)(3) protects the employee whose views come to diverge from those of this union." *Pattern Makers*, 473 U.S. at 106 (emphasis added); *see also Machinists v. Street*, 367 U.S. at 771 (emphasis added) (once the employee dissents, "the respective unions were *without power* to use payments thereafter tendered by them for such political causes"); *CWA v. Beck*, 487 U.S. at 762-63 (emphasis added) ("§ 8(a)(3) ... authorizes the exaction of *only* those fees and dues necessary to performing the duties of an exclusive bargaining representative of the employees in dealing with the employer on labor-management issues.")

Ignoring this Court's clear holdings in *Pattern Makers* and *Street*, the court of appeals upheld the unions' continued seizure of full dues from Nielsen even after he twice informed them that his views "had come to diverge from those of his union." *Pattern Makers*, 473 U.S. at 106. The court of appeals thus sanctioned a patchwork, crazy quilt system under the NLRA: union members may resign at will (under *Pattern Makers*), but the principal reason for the resignations—to cut off the use of their dues for political purposes (under *Beck*)—is subject to a union-imposed delay of up to one year.[4] The National Labor Relations Board, in administering this statute, reached the opposite conclusion on the identical issue. *California Saw & Knife Works*, 320 N.L.R.B. No. 11 (1996).

The court of appeals also failed to mention the practical (and indeed, unconscionable) result of its decision: that Nielsen was consigned—as a condition of continuing his employment and feeding his family—to supporting political candidates and causes he abhors. This Court has held that:

> The objective must be to devise a way of *preventing* compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities.

Chicago Teachers Union v. Hudson, 475 U.S. at 302 (emphasis added), citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 237. While the IAM unions would have continued collecting that portion of Nielsen's dues which funded collective bargaining

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[4] Nielsen's initial resignation and objection letter is reproduced in App. E, 69a. That letter establishes that the sole reason for his resignation was his desire to claim his rights under *CWA v. Beck* to stop funding the unions' political candidates and causes.

This demonstrates quite clearly that the statutory rights established by *Pattern Makers* and *Beck* are interdependent, for some courts have held that employees have no right to object and pay reduced representational fees until they first exercise their right to resign. *See, e.g., Kidwell v. TCIU*, 946 F.2d 283 (4th Cir. 1991) (union member must first resign in order to exercise her right to stop funding union political activities she abhors).

activities even after accepting his objections, the court of appeals decision fails to "prevent[ ] compulsory subsidization of ideological activity by employees who object." *Id.* This grave error, standing alone, shows the need for this Court to exercise its supervisory power to remedy a situation that Thomas Jefferson most certainly would have found "sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948); *accord Bromley v. Michigan Educ. Ass'n.*, 82 F.3d 686, 691 (6th Cir. 1996). Summary reversal is required because the decision of the court of appeals blatantly contravenes this Court's rulings that it is unlawful for a union to "collect from dissenting employees any sums for the support of ideological causes not germane to its duties as a collective bargaining agent." *Chicago Teachers Union v. Hudson*, 475 U.S. at 294, *citing Ellis v. BRAC*, 466 U.S. at 447; *see also Street*, 367 U.S. at 771. Indeed, the injury to Nielsen—five months of compelled political speech—is irreparable. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 235; *Elrod v. Burns*, 427 U.S. 347 (1976); *see also Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988).

C. A UNION'S CLAIM OF "ADMINISTRATIVE CONVENIENCE" CANNOT SUPERSEDE AN EMPLOYEE'S RIGHT TO HALT OBJECTIONABLE POLITICAL SPENDING.

The unions' sole excuse for continuing the collection of dues admittedly in excess of the costs of collective bargaining was Nielsen's "failure" to object during the "appropriate 30-day period," which (conveniently for the unions) pre-dated his resignation from union membership. (App. H, 74a). The court of appeals upheld this *Beck* "waiting period" based on the unions' bald claim of "administrative convenience" (App. B, at 20a-23a), *i.e.*, the notion that an international union with $71 million in annual revenues finds it too difficult to simply write to the objecting employee and say: "Your *Beck* objection was received. Effective immediately, your dues are reduced by 20%."

The unions' claim of "administrative convenience" is contrived. The IAM makes a single, nationwide dues reduction calculation each year, and applies that same percentage reduction across the board to all *Beck* objectors in the United States.

(Plaintiff's First Set of Requests for Admission). Nielsen merely sought to have that simple percentage reduction applied to his compulsory dues payments. All the IAM had to do to comply with *Beck* was to send Nielsen a letter stating: "We have calculated that all objectors in the United States are entitled to a 20% dues reduction. Instead of paying $40.00 per month, you should begin paying $32.00 for the remainder of this year." This is not "rocket scientist" work, nor is it "sophisticated accounting." It is no more "inconvenient" than sending Nielsen a letter stating that his *Beck* objection was "untimely" and therefore rejected. (App. H, 74a).

The court of appeals' bow to the "administrative convenience" of the IAM at the expense of the individual worker's rights is directly contrary to *Pattern Makers*. There, this Court held that the policy of "voluntary unionism" permitted employees to break ranks with their union in the middle of a strike—an action much more disruptive to unions than merely allowing them to withhold that portion of their dues which funds political candidates and causes. Yet the court of appeals, never mentioning the interdependent statutory rights to resign and cease funding political causes, *Kidwell v. TCIU*, 946 F.2d 283 (4th Cir. 1991), held that the unions' "administrative convenience" takes precedence over an individual employee's right of free speech and voluntary unionism. This is contrary to *Ellis v. BRAC*, 466 U.S. 435, 444 (1984) (rejecting "administrative convenience" where readily available alternatives exist); *Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (same); and *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (same).

Nothing in the NLRA, *Beck* or any other decision of this Court authorizes a union to construct arbitrary "window periods" to block union members who resign from claiming their related right to stop subsidizing political candidates and causes. In contrast, when Congress wanted to create "window periods" concerning the revocation of dues check-off authorizations, it expressly did so. *See* 29 U.S.C. § 186(c) (providing that dues check-off authorizations can be made irrevocable for a period of up to one year). The court of appeals pointed to nothing similar in the NLRA that permits unions to create internal rules limiting

nonmembers' rights under *Beck* and § 8(a)(3), for no such authorization exists.

Instead, the court of appeals wrongly focused on this Court's statement in *Street* that "dissent is not to be presumed," while ignoring the fact that Nielsen did dissent—twice—to no avail. (Apps. E - H, 69a to 73a). It is true that this Court has held that "dissent is not to be presumed," thus requiring the nonmember to meet a minimal burden to notify the union of his objections. *Machinists v. Street*, 367 U.S. at 774; *Hudson*, 475 U.S. at 306. However, nothing in those cases supports the court of appeals' view that unions may construct arbitrary "window periods" to limit the time and manner of such objections—all of which significantly add to the employees' minimal burden.

In contrast, *Street* directly supports Nielsen, who "dissented" twice in 1994 but nevertheless received no dues reduction. *Id.*, at 771; *see also* Nielsen's objection letters, Apps. E, 69a and G, 72a. The notion that "dissent is not to be presumed" does not provide the IAM with a license to ignore dissent for up to one year. *Street*, 367 U.S. at 771 (a union is "without power" to continue excessive collections after dissent is made known).[5]

Several appellate courts have upheld internal union "window periods" as a general matter, at least with regard to employees who are already nonmembers in the union. *Abrams v. CWA*, 59 F.3 1373, 1381-82 (D.C. Cir. 1995); *Tierney v. City of Toledo*,

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[5] It is not surprising that the Machinists (IAM) union concocted this "waiting period" policy to thwart *Beck* objectors. History shows this union to be in the forefront of hindering dissenters' rights in the face of this Court's protection of those rights. *California Saw & Knife Works*, 320 N.L.R.B. No. 11 (1996) (NLRB invalidates Machinist union policy requiring *Beck* objection letters to be individually signed and sent by certified mail); *Machinists Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984 (1992), *enf. denied*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, 473 U.S. 901 (1985) (Machinists union unlawfully restricts the right to resign at will); *Perry v. Machinists Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) (objecting nonmembers unlawfully required to wait up to 18 months to get a dues refund); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970), *further proceedings*, 533 F.2d 1126 (9th Cir. 1976) (pre-*Beck* challenges to IAM's dues collection scheme).

824 F.2d 1497, 1506 (6th Cir. 1987). These rulings find no support in this Court's cases, as the holding that "dissent is not to be presumed", *e.g.*, *Street* 367 U.S. at 774, does not support internal union rules limiting the right to *immediately* halt the forced subsidization of objectionable political and social causes once the dissent is proffered.

Moreover, the cases upholding internal "window periods" for the filing of *Beck* objections missed a critical point. For instance, the court of appeals below relied upon *Kidwell v. TCIU*, 731 F. Supp. 192, 205 (D. Md. 1990), emphasis added, which held:

> The 30-day window period for making objections is not unreasonable. *** The union, as well as the employees, have *an interest in the prompt resolution of obligations and disputes*. The 30-day window period *facilitates prompt resolution* [of such disputes].

Here, Nielsen has never disputed or "challenged" the IAM unions' calculation of the reduced fee, or sought to invoke their internal "arbitration" procedure. He merely wants to pay the reduced fee amount calculated by the unions, with no challenge to that amount. *See UFCW Local 951 v. Mulder*, 31 F.3d 365 (6th Cir. 1994) (unions may not force nonmembers to utilize their internal "arbitration" programs to challenge the amount of the reduced fee); *Abrams v. CWA*, 59 F.3d at 1382 (same).

As such, Nielsen's interest is in promptly paying only the union-calculated reduced fee and immediately halting the subsidization of admitted political activity, not resolving "challenges" to the union's calculation of that reduced fee. It is wrong to limit him to a single, thirty-day "window period" when his only interest is in cutting off his support of objectionable political activities as quickly as possible. "By allowing employees to resign *at any time*, § 8(a)(3) protects the employee whose views come to diverge from those of this union." *Pattern Makers*, 473 U.S. at 106 (emphasis added.)

Abrams v. CWA, 59 F.3d 1373 (D.C. Cir. 1995), also relied upon the analysis in *Kidwell v. TCIU*, 731 F. Supp. at 205, to validate a thirty-day window period policy, with no discussion of

how such a policy unfairly impacts on employees who merely want to pay the union-calculated reduced fee as quickly as possible, without "challenge." *Abrams*, 59 F.3d at 1381-82.

Even where courts have upheld "window periods," no decision, until this one, ever held that a newly resigned nonmember—someone akin to a new hire, who has never before exercised his right to object (because he never in fact had that right)—was subject to a "window period."

In contrast, the NLRB recently reached a contrary conclusion in *California Saw & Knife Works*, 320 N.L.R.B. No. 11 (1996). There, the NLRB ruled that "window periods" could not be applied to newly-resigned nonmembers (like Nielsen). The Board reasoned, logically, that a union member has no *Beck* rights to exercise until he first resigns. Thus, the existence of a "window period" for receipt of his first *Beck* objections places too great of a burden upon that right to resign.

> On careful consideration, we agree with the judge that the January window period, as applied solely to individuals who resign their union membership after the expiration of the window period, effectively operates as an arbitrary restriction on the right to be free to resign from union membership. *Pattern Makers v. NLRB*, 473 U.S. 95, 107 (1985); *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330 (1984). A unit employee may exercise *Beck* rights only when he or she is not a member of the union. An employee who resigns union membership outside the window period is thereafter effectively compelled to continue to pay full dues even though no longer a union member, and the window period in this circumstance operates as an arbitrary restriction on the right to refrain from union membership and from supporting non-representational expenditures. In light of our duty to uphold the fundamental labor policy of "voluntary unionism" emphasized by the Court in *Pattern Makers, supra*, we agree with the judge that the January window period, as applied solely to employees who resign their union membership after the expiration of the window period, constitutes arbitrary conduct violative of the IAM's duty of fair representation.

California Saw & Knife Works, 320 N.L.R.B. No. 11 at 13.

While the NLRB recognized the import of the policy of "voluntary unionism," the court of appeals sacrificed the policies of voluntary unionism and free speech on the altar of "administrative convenience." This decision adversely affects many thousands, if not millions, of employees, by undermining this Court's careful protection of the right to halt payments to objectionable politicians and ideological causes. *See Machinists v. Street*, 367 U.S. at 771 (emphasis added) (once the employee objects, "the respective unions were *without power* to use payments thereafter tendered by them for such political causes"); *CWA v. Beck*, 487 U.S. at 762-63.

CONCLUSION

The Petition should be granted, and the decision of the court of appeals summarily reversed. Alternatively, the Petition should be granted, and the case scheduled for full briefing and argument.

Respectfully submitted,

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January 1997

APPENDICES

APPENDIX A

ORDER OF THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September 30, 1996

United States Court of Appeals

for the Seventh Circuit
Chicago, Illinois 60604

Decided September 30, 1996

Before

Hon. DONALD P. LAY, *Circuit Judge*[1]

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

JEFFREY NIELSEN, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 95-2718 v.	
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO-CLC and MERCY AMBULANCE OF FORT WAYNE, INC., Defendants-Appellees.	No. 94-CV-337 **William C. Lee,** *Judge*.

[1]Honorable Donald P. Lay, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by counsel for the plaintiff-appellant on September 18, 1996, no judge in regular active service has requested a vote on the suggestion for rehearing *en banc*, and all judges on the original panel have voted to **DENY** the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby **DENIED.**

APPENDIX B

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE

SEVENTH CIRCUIT

September 5, 1996

[94 F.3d 1107]
Jeffrey NIELSEN, Plaintiff-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569, International Association of Machinists & Aerospace Workers, AFL-CIO-CLC and Mercy Ambulance of Fort Wayne, Inc., Defendants-Appellees.

No. 95-2718.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 7, 1995.

Decided Sept. 5, 1996.

* * * *

[1108]Before LAY,* CUMMINGS, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

This case presents two questions about the implementation of the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d

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*Honorable Donald P. Lay, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

634 (1988), which held that § 8(a)(3) of the National Labor Relations Act authorizes unions operating with an "agency shop" agreement to exact only those fees and dues necessary to perform the duties of an exclusive representative of the employees. First, plaintiff Jeffrey Nielsen argues that a union security clause in a collective bargaining agreement is unlawful on its face unless the clause itself furnishes notice of the employees' right to become fee objectors under *Beck*. Second, he argues that the actual enforcement of the clause at issue here violated the union's duty of fair representation and was therefore unlawful. In a careful and lengthy opinion, the district court rejected both claims. We affirm.

I

Since February 1992, Nielsen has been employed as a paramedic by Mercy Ambulance of Fort Wayne, Inc. Shortly after he was hired, he joined the International Association of Machinists and Aerospace Workers (IAM International) and its Local 2569. Mercy and Local 2569 were parties to a collective bargaining agreement that included the following union security clause:

> Section 1. Agency Shop:
>
> As a condition of continued employment, all employees included within the unit de-**[1109]**scribed in Article II of this Agreement shall either become a member of the Union and pay dues thereto, or in lieu thereof, shall pay an amount equal to the Union's initiation fee and shall thereafter pay to the Union each month, either directly or through payroll deduction, an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union. This obligation shall begin on the

first day of the month following completion of six (6) months' employment.

Each member of the bargaining unit covered by this Agreement who has not become a member of the Union, or in lieu thereof, has not tendered the equivalent of Union dues as provided above, within seven (7) days of the first day of any month following the effective date of this Agreement or completion of his/her sixth month of employment, shall be notified by the Union by certified mail, with a copy to the Company's Director of Operations, that failure to pay either dues or agency shop fees within ten (10) days following receipt of such notice shall result in termination of employment. Should the employee fail to make such payment with [sic] the ten-day period, the Company shall, within three (3) working days after receipt of notice by certified mail from the Union, discharge such employee.

This clause was not the only union document relating to fee levels. The IAM had also implemented a procedure for employees who wanted to invoke their rights under *Beck* to limit their fees to a level that would support only core representational activities. In December of 1993, IAM International mailed a newsletter, *The Machinist*, to all employees who were required to pay dues or fees to the IAM and its locals. This publication contained a notice to employees about their financial obligations under the union security clause, and explained the procedure for becoming a "fee objector" pursuant to *Beck*. The notice began by explaining that "[e]mployees working under collective bargaining agreements containing union security clauses are required, as a condition of employment, to pay monthly dues or fees to the union. This is their sole obligation to the union, regardless of the wording of the clauses." It then specified three different categories of employee: union members, who pay monthly dues;

nonmembers, who pay an equivalent "agency fee"; and nonmember objectors, who can exempt themselves from funding expenditures that are non-germane to the collective bargaining process. After explaining some of the benefits of collective bargaining and union membership and describing what expenditures are considered germane and non-germane, the notice set forth the process by which an individual could become a fee objector.

The 1993 notice stated that there would be a "window period" between January 1 and January 31 of each year, during which an objector was entitled to request that his or her monthly agency fee payment be reduced to reflect only representational expenses. The notice also made clear that objections could also be made during the first thirty days in which an objector is required to pay fees to the union. Fee reductions were based on the audited figures from the previous fiscal year, with adjustments made near the end of the calendar year if necessary. Objectors who were dissatisfied with the final reduction had the right to file a challenge to the calculation. In that event, the notice informed its readers that there would be an "expeditious appeal" before an impartial arbitrator chosen through the American Arbitration Association's Rules. All appeals relating to the year were to be consolidated. The union was to bear the cost of the arbitration and the burden of justifying its calculations. Last, fee objectors were required to renew their request for reduction of fees on an annual basis.

Nielsen received this notice in December of 1993, but he took no action at that time. Instead, on July 5, 1994, he wrote a letter of resignation from the union to Rebecca Smith, the President of Local 2569, in which he also announced that he was invoking his rights under *Beck* to "declare [himself] protected by financial-core status." He also asked the Local to "return any reduced dues owed to [him]" and to adjust future payments

accordingly. Smith responded on July 22, 1994, with a letter accepting his resignation and [1110]informing him that he needed to address his request to become a fee objector to the General Secretary-Treasurer of IAM International, Donald Wharton. Nielsen did so in a letter of August 16, 1994, in which he again stated that he wanted to be a financial core objector in accordance with *Beck*. He specifically objected to the collection and use of his money for purposes other than direct expenses associated with collective bargaining, contract administration, and grievance processing for employees in his unit.

Wharton replied in a form letter sent on August 24, 1994, that Nielsen had not "properly perfected" his request to be a fee objector in accordance with the December 1993, guidelines because the request was not postmarked or received during the appropriate 30 day period. In November 1994, Nielsen received another dues objector notice (again in *The Machinist*) for 1995. He filed an objection for 1995 in accordance with the procedures set forth, and received the requested reduction in fees effective that year. In a sense, therefore, this case is about the marginal dues that Nielsen paid between August 1994 and December 1994, due to the union's adherence to the procedures it had established for presenting dues objections.

II

Nielsen filed his complaint for a declaratory judgment in the district court on November 17, 1994, naming IAM International, Local 2569, and Mercy Ambulance as defendants. He alleged that his claims arose under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), and the duty of fair representation implicit in § 9, as well as under the collective bargaining agreement between Mercy and the union. He claimed that all defendants violated § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), and

the duty of fair representation, by negotiating and implementing the agency shop clause set forth above, which he asserted was facially invalid under *Beck*. He also claimed that IAM International and Local 2569 had violated the duty of fair representation by their enforcement of the union security clause.

In two orders entered on June 21, 1995, the district court concluded that IAM International and Local 2569 were entitled to summary judgment and that the action against Mercy had to be dismissed. With respect to Mercy, Nielsen conceded that the second claim for relief did not assert anything against Mercy and thus that the only question was whether a claim was stated under the first count. To the extent that the first count directly challenged the language of the collective bargaining agreement under § 8(a)(3), the court concluded that it had no jurisdiction over the claim, due to the preemption rule of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). It rejected Nielsen's argument that Mercy could be sued under both *Beck* and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), for its actions in entering into and enforcing an allegedly facially invalid contract. The court reasoned that Nielsen was trying to bring a § 301 action against the employer for negotiating and maintaining the clause—a claim within the primary jurisdiction of the NLRB. Since Nielsen did not state any claim independently cognizable under § 301 against Mercy, the court granted Mercy's motion to dismiss.

In its second order, the district court granted summary judgment to IAM International and Local 2569. It concluded that nothing in *Beck* prohibited unions from negotiating agency shop agreements, which are permitted by the first proviso to § 8(a)(3). Instead, *Beck* addressed the manner in which a union security clause could be enforced, making it clear that the maximum amount of dues an employee could be required to pay

under such a clause had to correspond to core representational activities. The court found that the notice of the right to be a fee objector that appeared in *The Machinist*, which Nielsen and the other employees received, was adequate to protect their *Beck* rights. Finally, it rejected Nielsen's argument that the one-month "window period" was too restrictive. Nielsen's appeal from the final judgment entered on the basis of the June 21 orders raises three issues: (1) whether the agency shop clause was facially invalid, because it failed to indicate that the **[1111]***Beck* exception to the duty to pay full union dues or their equivalent was available; (2) whether the union was not entitled to impose the "window period" restriction on Nielsen's assertion of his *Beck* rights, either because the notice in *The Machinist* was ineffective or because the time period was too narrow; and (3) whether the district court erred in concluding that it had no jurisdiction over Mercy.

III

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to discriminate in hiring, tenure, or terms of employment either to encourage or to discourage union membership. It has two provisos, the first of which is pertinent here. The first proviso essentially permits agency shop clauses in collective bargaining agreements, by stating that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later...." The Act also imposes duties on unions, including a statutory duty of fair representation under § 8(b). See *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909-10, 17 L.Ed.2d 842 (1967); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S.

65, 67, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991). Although the question whether a collective bargaining agreement complies with § 8(a)(3) normally falls within the NLRB's exclusive jurisdiction to rule on unfair labor practices, an exception exists when a union is accused of a breach of the duty of fair representation in a suit brought under § 301. In *Beck*, the Court held that the union could defend its representational practices by arguing that they were permitted by § 8(a)(3), and therefore that a federal court could decide the unfair labor practice issue as a matter collateral to the § 301 claim. This distinction is important, as we will see, to the respective suits against Mercy and against the two union defendants.

Although the Supreme Court had considered the rights of fee objectors in an earlier line of cases, discussed below, *Beck* was its first opportunity to consider the rights of nonmembers of a union in a private-sector company who objected to paying dues under an agency shop clause for activities unrelated to collective bargaining, contract administration, and grievance adjustment ("core representational activities"). Relying heavily on the close relationship between § 8(a)(3) of the NLRA and § 2, Eleventh of the Railway Labor Act (RLA), the Court in *Beck* concluded that a union would violate its duty of fair representation if it attempted to require employees to support union activities beyond those germane to core representational matters. The Court noted that it had reached the same result with respect to § 2, Eleventh of the RLA more than twenty-five years earlier in *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and it stated that "[o]ur decision in *Street* ... is far more than merely instructive here: we believe it is controlling." 487 U.S. at 745, 108 S.Ct. at 2649. In light of that statement, we too look to *Street* and related decisions for guidance here.

In *Street*, the Court made clear that "the union-shop agree-

ment itself is not unlawful" for purposes of § 2, Eleventh of the RLA. 367 U.S. at 771, 81 S.Ct. at 1801. The problem lay instead in the use of objectors' money for certain political purposes. Given the nature of the problem, it concluded that "an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate to the violation of the Act's restriction on expenditures." *Id.* The Court also found that any remedy "would properly be granted only to employees who have made known" their objections to the union officials. *Id.* at 774, 81 S.Ct. at 1802-03. Dissent "is not to be presumed." *Id.*

Between *Street* and *Beck*, the Court revisited the question of the rights of fee objectors five times: three times in the public-sector employment context, *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), Chicago *Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), and *Lehnert v.* **[1112]***Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), and twice under the *RLA*, *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). In *Allen*, the first of this line of cases, the Court reiterated that dissent is not to be presumed and decided that it was enough for purposes of stating a claim for an objector to manifest his opposition to any political expenditures by the union. Those who could not prove that they had made their objection known, however, would not be entitled to relief. It also found that an injunction forbidding the union from collecting any money was too broad, because under *Street* the union could compel the payment of funds for purposes germane to collective bargaining. Finally, it held that the union would bear the burden of demonstrating which expenditures were political, and what proportion

they bore to total expenditures.

Abood shifted the focus of attention to public-sector collective bargaining agreements. Even in that context, the Court once again declined to strike down agency shop clauses across the board. Instead, it focussed on the rights of individuals (this time under the First Amendment, because state action was involved) not to contribute to political causes to which they objected. The objective of any remedy, it stated, "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." 431 U.S. at 237, 97 S.Ct. at 1800. Reaffirming *Street's* conclusion that dissent could not be presumed, the Court found that an employee could adequately express his or her dissent by objecting to ideological expenditures of *any* sort; employees could not be required to object to each particular expenditure. The Court also suggested that the best remedy might consist of the union's adoption of internal procedures for processing fee objector claims.

Ellis was concerned with two procedural aspects of a union's fee objector program: a system under which the union collected the full amount of a protesting employee's dues, used the money, and paid a rebate a year later, and the union's effort to categorize certain expenditures as germane to representational activities. Notably, in *Ellis* there was no dispute about the employees' status as fee objectors; the only question was whether dues reductions had to be implemented immediately for objectors or if an after-the-fact rebate was permissible. The Court found that the rebate system was unsatisfactory, because it amounted to a forced loan from the objecting employee to the union. The Court also considered the germaneness of six categories of expenditures: conventions (yes), social activities

(yes), publications (yes, as long as the charge is prorated to cover only representational materials), organizing (no), litigation (yes, but only insofar as it relates to matters like negotiating and administering the contract, settling grievances or disputes within the unit, and fair representation litigation within the unit), and death benefits (no ruling). In *Lehnert*, the Court again addressed which items could be considered germane, concluding (among other things) that it was possible in some circumstances that activities associated with state and national affiliates would be germane even if they were not performed for the direct benefit of the objecting employee's bargaining unit. 500 U.S. at 524, 111 S.Ct. at 1961-62.

In *Hudson*, the Court returned to the subject of internal procedures in the public-sector context. The Chicago Teachers Association had adopted a system under which fee objectors could obtain a rebate of the portion of their dues that was non-germane to core representational activities. It had also established an internal arbitration procedure for those who were dissatisfied with the initial adjustment. Finally, it made some efforts to inform its members of their right to object. The Court found deficiencies in all three aspects of this system and held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the **[1113]** amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078.

In spite of the different statutes and contexts in which these cases have arisen, the lower courts have increasingly drawn from each line freely in considering the rights of fee objectors. Thus, for example, the procedures required in *Hudson* have come to be recognized as appropriate for *Beck* cases as well. *Abrams v.*

Communications Workers of America, 59 F.3d 1373, 1377, 1380 (D.C.Cir.1995); *Kidwell v. Transportation Com. Intern. Union*, 946 F.2d 283, 294 (4th Cir.1991), *cert. denied*, 503 U.S. 1005, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992); *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1301 (4th Cir.1993). The germaneness guidance offered by the Court in *Ellis* has also been applied in private sector NLRA cases. See *Abrams*, 59 F.3d at 1377; *Kidwell*, 946 F.2d at 293-94. It is clear under *Beck* that the type of objection necessary to invoke fee objector rights is no more than that required in *Allen* and *Abood*. In our own assessment of Nielsen's claims, therefore, we draw on each of these decisions to the extent that their reasoning applies to the private sector. (We do not address the issue here whether an agency shop clause under § 8(a)(3)'s first proviso amounts to state action, thereby raising First Amendment concerns, both because the Supreme Court saw no need to go that far in *Beck* itself and because Nielsen has not argued this point.)

One final point requires brief discussion before we evaluate Nielsen's particular claims. His claims against IAM International and Local 2569 arise under the duty of fair representation contained in § 8(b)(1)(A) of the NLRA. This affects the standard of review applicable here. In *Vaca*, the Supreme Court summarized that duty as follows:

> [T]he exclusive agent's statutory duty to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

386 U.S. at 177, 87 S.Ct. at 910. A breach of the duty occurs, the Court held, "only when a union's conduct toward a member

of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916. In *O'Neill*, a unanimous Court ruled that the *Vaca* standard "applies to all union activity, including contract negotiation." 499 U.S. at 67, 111 S.Ct. at 1130. Something would be arbitrary for these purposes, the Court explained, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' ... as to be irrational." *Id.* (internal citations omitted). This is the standard of review that governs Nielsen's claims against the union defendants.

We turn first to Nielsen's claim that the agency shop clause in the IAM collective bargaining agreement was facially invalid. Nielsen argued strenuously (with extensive use of exclamation points and boldface type) that the clause was invalid under § 8(a)(3) and *Beck* because the reader could conclude that no exceptions to the duty to pay full dues or their equivalent existed. According to Nielsen, *Beck* forbade the negotiation of anything other than a clause that explicitly noted that employees were only obligated to pay for core representational activities. The union defendants respond that the NLRA expressly allows the negotiation of contract clauses "requiring as a condition of employment membership" in a union, in the first proviso of § 8(a)(3), and that the second proviso also expressly provides that employers may not discharge employees pursuant to such a contractual clause for any reason other than "the failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring membership." The clause here, the union argues, does not even go as far as § 8(a)(3) would permit, because it does not require union membership. It points out that nothing in *Beck* or the statute requires the union security clause to cite every exception that might apply, including, in addition to *Beck* rights, the right to be a religious objector, the right not to pay if a union rejects the

employee's **[1114]**membership application, or the right to be relieved of initiation fees. Here, Nielsen obviously knew about his *Beck* rights, because he invoked them. The union asserts that nothing more is required.

Two other courts of appeals have considered the facial validity of union security clauses in the light of *Beck*: the District of Columbia Circuit and the Eighth Circuit. In *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (IUE) v. NLRB*, 41 F.3d 1532 (D.C.Cir.1994), the Court of Appeals for the D.C. Circuit squarely confronted the question whether a union acted in bad faith by maintaining a union security clause that did not include notice of *Beck* rights on its face. The NLRB had found a breach of the duty of fair representation. Refusing to enforce that decision, the D.C. Circuit found "not one iota of evidence" indicating that the union's conduct was in bad faith. *Id.* at 1538. There was no evidence that the IUE had ever attempted to enforce the clause unlawfully or had tried to exact fees in excess of those permitted by *Beck* from any employee. Furthermore, the court noted, "*Beck* speaks only to the level of dues an employee may lawfully be required to pay under a union-security agreement," not to the question what language is permissible in such an agreement. *Id.* at 1539. Problems might arise only if a union were to "adopt union-security provisions of the sort at issue here without appropriate 'notice' to employees who are covered by such provisions." *Id.* at 1534. See also *Abrams*, 59 F.3d at 1378-79 (following IUE). In the case before it, the union did not violate its duty of fair representation, because the measures it took to assure the rights of fee objectors (including the notice it used) were "fully consistent with established law." 41 F.3d at 1534. The court found the union security clause itself to be facially valid.

The context in which the Eighth Circuit faced the facial validity issue was quite different, and thus it is not clear whether the Eighth Circuit would disagree with the D.C. Circuit if confronted with the same fact situation that was before the latter. See *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir.1994). The collective bargaining agreement in *Bloom* had a standard union security clause, requiring union membership as a condition of continued employment. The employer, Group Health, accordingly withheld union dues and initiation fees from Bloom's paycheck, but it did so without his authorization. When Local 12 sent Bloom a letter asking him to complete and sign a membership application and a voluntary dues checkoff card, Bloom responded that he first wanted to review a breakdown of how union dues were spent. Local 12 gave him something indicating categories of expenditures, but it neither informed him of the percentage of dues spent on nonrepresentational activities nor did it advise him of his *Beck* rights. Bloom later filed unfair labor practices charges against both Group Health and Local 12, which were resolved in a settlement agreement. It was the adequacy of the settlement agreement that was before the Eighth Circuit.

The court decided that the settlement agreement should have required the expunction of the union security clause in these circumstances, because it had been "unlawfully interpreted and applied." *Id.* at 1005. It also noted in passing that it found the clause ambiguous, because it did not inform employees that they could not be terminated even if they did not want to be full-fledged union members, relying on the Board's decision in *IUE* that was later overturned by the D.C. Circuit. Because the union had apparently taken no steps to assure the rights of *Beck* objectors, the Eighth Circuit was not faced with the question whether a general union security clause, coupled with adequate notice or actual awareness of *Beck* rights, would have been sufficient to satisfy the duty of fair representation.

In addition to the D.C. Circuit's conclusion in *IUE* and *Abrams*, the NLRB and its General Counsel have also proceeded on the assumption that union security clauses are valid on their face. Shortly after *Beck* was decided, the *General Counsel of the Board issued Guidelines Concerning CWA v. Beck* (Memorandum GC 88-14, November 15, 1988), 1988 WL 236187 (N.L.R.B.G.C.). The section entitled Requirements Imposed on Union" begins with the following statement:

> [1115]If a union has a union-security clause covering statutory employees, and if it expends part of the funds collected thereunder on non-representational activities, that union has an obligation to notify nonmember employees: (1) that a stated percentage of funds was spent in the last accounting year for nonrepresentational activities; (2) that nonmembers can object to having their union-security payments spent on such activities; and (3) that those who object will be charged only for representational activities.

Id. at *1. Nothing in the Guidelines indicates that information of this detail must appear in the union security clause itself. To the contrary, it is clear both from this passage and from the remainder of the Guidelines that the General Counsel considered a separate notice both necessary and sufficient. In its recent decisions in *California Saw and Knife Works*, 320 NLRB No. 11 (Dec. 20, 1995), 1995 WL 791959 (N.L.R.B.), and *United Paperworkers International Union*, 320 NLRB No. 12 (Dec. 20, 1995), 1995 WL 791957 (N.L.R.B.), the Board discussed the separate issue of the adequacy of the implementation of a *Beck* policy. It did not, however, cast any doubt on the facial validity of a general union security clause like the one we have here.

We agree with the D.C. Circuit and the NLRB that *Beck* did not, either explicitly or implicitly, call into question the facial

validity of union security clauses. Dissent, a the Supreme Court has repeatedly noted, is not to be presumed. See *Street, Allen,* and *Abood, supra*. Under *Beck*, the critical questions instead are whether the union is spending money on activities going beyond the scope of core representational matters, and if it is, how the union is assuring that the rights of potential fee objectors will be respected. Because the Eighth Circuit was not presented with an alternative mechanism for assuring those rights in the *Bloom* case, it is unclear at best whether it would find that only a modification of the union security clause itself would suffice to protect objecting employees. (In our view, therefore, the district court in Minnesota may have over-read *Bloom* in its decision in *Schreier v. Beverly California Corp.*, 892 F.Supp. 225 (D.Minn.1995), when it concluded that the Eighth Circuit rule squarely forbids unqualified union security clauses.) In this case, as in *IUE*, there is no evidence whatever that the union acted arbitrarily, discriminatorily, or in bad faith, within the meaning of *Vaca* and *O'Neill*, when it negotiated the agency shop clause applicable to Local 2569 members. In the absence of such evidence, it does not violate a union's duty of fair representation to have such a clause in a collective bargaining agreement. We therefore reject Nielsen's argument of facial invalidity and turn to his more particularized arguments regarding the implementation of this clause.

Nielsen argues that two problems are presented by IAM International's application of its union security clause in this case. (We note that he does not mention Local 2569 in this respect. It thus appears to be undisputed that Local 2569 would not be liable in any event under his implementation theories.) First, he claims that the notice of his right to be a fee objector "is sent in a manner which discourages employees from actually seeing it," and second, he claims that IAM International has no power to restrict his assertion of his *Beck* rights to a one-month "window

period." We address these claims in turn.

The district court found that Nielsen himself received both the December 1993 notice and the November 1994 notice in *The Machinist*. In his brief to this Court, Nielsen concedes that he "is on the subscription list and receives ... *The Machinist*." Appellant's Brief at 7. We therefore do not have a case of either a new employee or an employee who raised a genuine issue of fact about actual receipt of notice. Upon its own review of an actual copy of the December 1993 notice, the district court found "that the notice is well-marked, as it is listed in the table of contents on the second page, and is printed in legible type and highlighted in green on the seventh page. (The entire magazine is only eight pages in length.)" We, too, have reviewed the notice, and we agree with that characterization.

In *California Saw & Knife Works*, the NLRB found that both the form and content of the notice in *The Machinist* was "sufficient **[1116]**to satisfy the union's obligation under the duty of fair representation to notify nonmembers of their rights under *Beck*." 320 NLRB No. 11 at 12, 1995 WL 791959, *13 (NLRB). It specifically found that the system of mailing notice to all represented employees, which IAM International used here as well, fell within the "wide range of reasonableness" permitted to a union under the duty of fair representation. *Id.* The district court in Nielsen's case came to the same conclusion, and again, we agree. Accordingly, we find that IAM International did not violate its duty of fair representation to Nielsen when it informed him of its *Beck* policy through the notice that appeared in *The Machinist*.

The last issue relating to IAM International relates to the "window period" for making one's *Beck* objections known. As noted above, Nielsen received notice of his *Beck* rights in

December 1993 and did not file an objection during the January 1994 filing period. Instead, he waited until July 1994, when he first notified Local 2569 of his desires, and then, after President Smith informed him that he needed to contact IAM International directly, he did so on August 16, 1994. The question here is therefore a straightforward one: does a union violate its duty of fair representation when it establishes a one-month "window period" for the invocation of *Beck* rights?

The union argues that the "window period" is a reasonable administrative device that helps the union to process its dues objector claims and to keep its annual budget straight. The district court noted that without the limited time period for filing and processing objections, the program would be unworkable:

> Each annual objection necessitates revisions in the records of three organizations, each of which is entitled to a percentage of the fees which must be reduced: the local union, the intermediate union or district lodge, and the International Union. Objections can potentially come from any of the 1300 local unions, representing approximately 500,000 employees, and currently it costs IAM over $200,000.00 to operate its dues reduction system. Under the IAM procedures, each objector has an opportunity to challenge the fee reduction calculation in a union-funded arbitration procedure.

The costs of administration would plainly be higher if the union were required to handle objections on a rolling basis throughout the year. Furthermore, such a system would make it somewhat more difficult to create an annual budget for the non-representational activities of the union, because the revenue side of the balance book would always be in doubt. In a similar situation, this Court refused to order restitution in a case challenging the

deduction of a public union's fee, because an after-the-fact deduction might embarrass the union financially. See *Gilpin v. American Federation of State, County, and Municipal Employees*, 875 F.2d 1310, 1313 (7th Cir.1989).

We see nothing in *Ellis* or *Hudson*, which forbade the use of rebate systems for employees who had validly registered their fee objections, that casts doubt on the use of a "window period." If the union already knows that a certain number of employees are fee objectors, as was the case in *Ellis* and *Hudson*, then it has no right to collect monies from those employees notwithstanding their objections, and rebate the sums a year later. Nielsen's case is different, because it presents the threshold question of how and when one can become a fee objector. Nothing in the NLRA or in *Beck* confers a right to instantaneous action, regardless of the administrative burden the union might bear in implementing these requests.

It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion, and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. Other courts that have considered "window periods" have come to the same conclusion. See *Abrams*, 59 [1117]F.3d at 1381-82; *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir.1987) (requiring non-union members to object by January 31 of a given year permissible if the union makes appropriate disclosures before objections must be made); *Andrews v. Education Ass'n of Cheshire*, 653 F.Supp. 1373, 1378 (D.Conn.1987), *aff'd*, 829 F.2d 335 (2d Cir.1987);

Kidwell v. Transportation Communications Int'l Union, 731 F.Supp. 192, 205 (D.Md.1990), *aff'd. in part and rev'd in part on other grounds*, 946 F.2d 283 (4th Cir.1991), *cert. denied*, 503 U.S. 1005, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992).

The Board's position in this respect has been inconsistent. In the *General Counsel's Guidelines Concerning CWA v. Beck*, it stated clearly that "if the union has a 'time window' for filing objections, the notice must set forth that information and the time period must be reasonable." 1988 WL 236187 at *2. The obvious implication of this statement is that at least some "window periods" are permissible. In its more recent decision in *California Saw and Knife Works*, however, the Board found that the IAM's January "window period" operated as an arbitrary restriction on the right to be free to resign from union membership and thus violated the duty of fair representation. 320 NLRB No. 11, at 13, 1995 WL 791959 at *15. The Board's position in *California Saw and Knife*, however, gives no weight at all to the union's legitimate administrative needs--indeed, it almost requires the union to find the system that imposes the least restriction on *Beck* rights possible. Such exacting scrutiny is inconsistent with *Vaca* and *O'Neil*, which require us to uphold the union's actions as long as they fall within a generous range of reasonableness. Because the IAM has offered valid administrative justifications for its system here, we conclude that it has not violated its duty of fair representation by imposing an annual "window period" for registering fee objections.

Last, we review the district court's dismissal of the action against Mercy. Unlike the case against IAM International and Local 2569, the action against Mercy directly challenges the validity of the agency shop clause in the collective bargaining agreement as an unfair labor practice. There is no claim that Mercy breached the agreement as written, nor is there a claim

that Mercy itself owed a duty of fair representation to Nielsen. Thus, this is not the kind of suit under § 301 of the LMRA, 29 U.S.C. § 185(a), that can be brought against Mercy. Put differently, in spite of Nielsen's effort to characterize his § 8(a)(3) claim against Mercy as "collateral," and thus cognizable in a § 301 suit, the problem is that it is not collateral to anything cognizable under § 301. Instead, Nielsen's request for a declaration that the union security clause is "facially invalid and void under the National Labor Relations Act" is the kind of claim that the Supreme Court has ruled must be brought before the Board. See *Beck*, 487 U.S. at 742, 108 S.Ct. at 2647; *Garmon*, 359 U.S. at 244-45, 79 S.Ct. at 779-80. The district court therefore properly granted Mercy's motion to dismiss.

For the foregoing reasons, we AFFIRM the judgment of the district court in its entirety.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Granting Defendant Union's Motion for Summary Judgment)

June 21, 1995

[895 F. Supp. 1103]
Jeffrey NIELSEN, Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569, International Association of Machinists & Aerospace Workers, AFL-CIO-CLC, Mercy Ambulance of Fort Wayne, Inc., Defendants.

No. 1:94-cv-337.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

June 21, 1995.

* * * *

[1105]*ORDER*

WILLIAM C. LEE, District Judge.

This matter is before the court on Union Defendants' and Plaintiff Jeffrey Nielsen's Motions for Summary Judgment. On March 31, 1995, Plaintiff Nielsen filed a Motion for Summary Judgment and a Request for Oral Argument. Union Defendants filed a Motion for Summary Judgment on April 28, 1995. On May 1, 1995, Defendant Mercy Ambulance filed a Brief in Response to Nielsen's Motion for Summary Judgment. Nielsen filed a Memorandum of Law in Opposition to Union Defendants Motion for Summary Judgment on May 30, 1995. On June 15,

1995, Union Defendants filed their Reply Memorandum. For the following reasons, Union Defendants' Motion for Summary Judgment is granted, and Plaintiff Nielsen's Motion for Summary Judgment is denied.

FACTUAL BACKGROUND[1]

Plaintiff Nielsen is employed as a paramedic by Mercy Ambulance, and has been so employed since approximately February of 1992. He is employed within a bargaining unit represented by IAM Local Lodge 2569 ("Local 2569"). Mercy Ambulance and Local 2569 are parties to a collective bargaining agreement governing the employment of a bargaining unit of paramedics and related employees, including Plaintiff Nielsen. In pertinent part, the collective bargaining agreement provides the following:

> Section 1. Agency Shop:
>
> As a condition of continued employment, all employees included within the unit described in Article II [sic] of this Agreement shall either become a member of the Union and

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[1] The facts are taken from those enumerated in plaintiff's and Union Defendants' Motions for Summary Judgment, and include those not in dispute by the parties. "The union defendants accept and incorporate by reference the material facts as recited in plaintiff's motion...." (Union Defendants' Memorandum in Support of Their Motion for Summary Judgment, p. 2.) Defendant Mercy Ambulance also does not dispute any of the factual allegations contained in Nielsen's Statement of Material Facts, except that Mercy denies any knowledge as to the exact amount charged by the union to voluntary dues-paying members as opposed to the amount charged by the union to dues objectors. Mercy claims that it engages in an automatic dues deduction based on the numbers submitted to it by the union and is not involved in the internal administration of the union. (Defendant Mercy Ambulance's Opposition to Plaintiff Jeffrey Nielsen's Motion for Summary Judgment, pp. 1-2.)

pay dues thereto, or in lieu thereof, shall pay an amount equal to the Union's initiation fee and shall thereafter pay to Union each month, either directly or through payroll deduction, an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union. This obligation shall begin on the first day of the month following completion of six (6) months' employment.

Each member of the bargaining unit covered by this Agreement who has not become a member of the Union, or in lieu thereof, has not tendered the equivalent of Union dues as provided above, within seven (7) days of the first day of any month following the effective date of this Agreement or completion of his/her sixth month of employment, shall be notified by the Union by certified mail, with a copy to the Company's Director of Operations, that failure to pay either dues or agency shop fees within ten (10) days following receipt of such notice shall result in termination of employment. Should the employee fail to make such payment with [sic] the ten-day period, the Company shall, within three (3) working days after receipt of notice by **[1106]**certified mail from the Union, discharge such employee.

(Exhibit 1, Plaintiff's Motion for Summary Judgment.)

Shortly after being hired by Mercy Ambulance, Plaintiff Nielsen joined the IAM International and its Local 2569 as a member in good standing. On or about July 5, 1994, Plaintiff Nielsen sent a letter to Local 2569 resigning from membership in the unions and invoking his right to be allowed to pay "reduced dues" pursuant to *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). On or about July 22, 1994, Local 2569, by and through its president, Rebecca Smith, sent Plaintiff Nielsen a response indicating that while his resignation from union membership was "accepted,"

Local 2569 was "in no position to act upon your request to become a fee objector." The letter also stated: "If you wish to pursue this matter further, I suggest you take the matter up with the General Secretary-Treasurer directly," referring to IAM International's General Secretary-Treasurer. (Exhibit 3, Plaintiff's Motion for Summary Judgment.) Defendant Local 2569 is affiliated with Defendant IAM International.

On or about August 16, 1994, Plaintiff Nielsen sent a letter to Donald E. Wharton, General Secretary-Treasurer of the IAM International, stating in part:

> I hereby notify you that I wish to be a "financial core objector" only, in accordance with the Supreme Court's decision in *CWA v. Beck* [487 U.S. 735], 108 S.Ct. 2641 [101 L.Ed.2d 634] (1988).
>
> I object to the collection, as well as the use, of any of my money for any purposes other than paying my pro rata share of your *direct* expenses for fulfilling your *limited* statutory duty under § 9(a) of the NLRA to engage in collective bargaining, contract administration and grievance processing for the unit of employees at in [sic] which I am employed.

(Complaint ¶ 16; Exhibit 4, Plaintiff's Motion for Summary Judgment.)

On or about August 24, 1994, Defendant IAM International, by and through its General Secretary-Treasurer, Donald E. Wharton, responded to Nielsen that his objection to the amount of dues and fees that he was required to pay was "not properly perfected under the guidelines set forth in the Official Notice in the December, 1993 issue of *The Machinist*." Specifically, the Wharton correspondence stated that Nielsen's request "was not postmarked or received during the appropriate 30 day period."

(Complaint ¶ 17; *see* Exhibit 5, Plaintiff's Motion for Summary Judgment.) Defendant IAM International acts as an agent of Defendant Local 2569 for the limited purposes set forth in the "Official Notice."

In December of 1993, IAM International mailed to Plaintiff Nielsen a newspaper containing a notice describing his right to receive a dues reduction ("dues reduction notice"). Plaintiff Nielsen received that notice. All employees who are required to pay dues or fees to the IAM and IAM-affiliated Local also were mailed this same notice. That notice specifies that nonmembers working under collective bargaining agreements containing union security clauses are entitled to a fee reduction, "regardless of the wording of the [union security] clause." (*See The Machinist*, Vol. XLVII, No. 8, Dec. 1993, Exhibit 3 to Plaintiff's Memorandum in Opposition to Union Defendants' Motion for Summary Judgment.)

The annual objection notice informs employees (1) of the types of expenditures that are classified as chargeable to objectors; and (2) of the approximate proportion of union expenditures in each category, so that the employee can estimate the amount of the advance reduction payment that would be received upon objecting. The notice further explains that objectors will be given a full explanation of the calculation of the fee reduction and an opportunity to challenge that calculation in arbitration. The notice also explains that employees must make their objection during a one-month window period, in January of each year, or during the first thirty (30) days in which an objector is required to pay fees to the union.

Nielsen received his dues objector notice for the 1995 year in November of 1994. Beginning in the year 1995, the request to [1107]become a fee objector can be made by regular mail service, as well as by certified mail. Also, the period during which employees can object runs from December 1, 1994, to January

31, 1995, instead of just during the month of January, as provided in the December 1993 notice. Plaintiff did file an objection for the 1995 year as mandated by the Unions' rebate plan.

Since July 5, 1994, Mercy Ambulance has continued to deduct from Plaintiff Nielsen's salary an amount of money equal to the full union dues that voluntary members of the unions pay. IAM International uses some of the money collected from Plaintiff Nielsen for nonrepresentational activities. However, IAM International acknowledges that an objection by Nielsen was properly filed for the year 1995, and that Nielsen will receive the 1995 reduction to which he is entitled.[2] There are approximately one-half million employees currently represented by IAM-affiliated unions, holding their membership in over 1300 local unions or lodges affiliated with IAM. Operating IAM's *Beck* system costs in excess of $200,000.00 each year.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago,* 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in

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[2] The court notes that the facts relating to the 1995 dues objector policy and Nielsen's 1995 objection are merely background, as the claims in this case relate to the 1994 dues objector policy and the unions' conduct during 1994.

which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252, 106 S.Ct. at 2512; *In re Matter of Wildman*, 859 F.2d 553, 557 (7th Cir.1988); *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir.1988); *Valentine v. Joliet Township High School District No. 204*, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir.1992) (quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. *Goka v. Bobbitt*, 862 F.2d 646, 649 (7th Cir.1988); *Guenin v. Sendra Corp.*, 700 F.Supp. 973, 974 (N.D.Ind.1988); *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether there are genuine issues of material fact, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party con-**[1108]**tends there is no genuine issue. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record all material facts to which the non-movant contends there are exists a genuine issue necessary to be litigated. *See Waldridge v. American Hoechst Corp.* et al., 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson*, 477 U.S. at 249-51, 106 S.Ct. at 2511. However, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained," and in such cases summary judgment is appropriate. *Mason v. Continental Illinois Nat'l Bank*, 704 F.2d 361, 367 (7th Cir.1983).

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Id.* The issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356; *First National Bank of Cicero v. Lewco Securities Corp.*, 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one

party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. at 2512.

Because no genuine issues of material fact exist in the case at hand, the court can decide the Motions for Summary Judgment as a matter of law.

DISCUSSION

The first claim for relief in Nielsen's Complaint is made jointly against both Local 2569 and Mercy Ambulance. Plaintiff Nielsen claims that,

> Defendant Local Lodge 2569, in concert with Mercy Ambulance, has violated the National Labor Relations Act and the fiduciary duty of fair representation that it owes to plaintiff Nielsen ... by negotiating and maintaining [the] union security clause.... That clause is facially invalid because it purports to require the Plaintiff, as a condition of his employment, to pay more than "that portion of union dues and fees attributable to the union's representational activities." (citations omitted)

(Complaint ¶ 20.) The plaintiff further claims that the union security clause is facially invalid because it misrepresents the extent and actual limits of the obligation which may be imposed upon them, and by negotiating and maintaining this clause subsequent to *Beck*, Local 2569 has not acted toward Plaintiff and other employees with complete honesty and good faith, but has acted arbitrarily and dishonestly by overstating the limits of their obligation to the union. (Complaint ¶ 21.) Finally, in the first claim for relief, Plaintiff states that "Mercy Ambulance, in concert with Defendant Local Lodge 2569, has violated the National Labor Relations Act, as construed by *Beck*, by negotiating and maintaining a union security clause which requires Plaintiff Nielsen, as a condition of his employment, to pay more

than 'that portion of union dues and fees attributable to the union's representational activities.' " (Complaint ¶ 22.)

The Plaintiff's second claim for relief alleges that the Union Defendants have enforced the union security provision by requiring the Plaintiff to continue, as a condition of his employment, to pay amounts equal to the dues paid by voluntary union members. (Complaint ¶ 23.) The Plaintiff claims that enforcement of the union security clause violates the duty of fair representation because it forces Nielsen to pay in excess of his *pro rata* share of the unions' cost of representation, and thereby imposes an obligation which may not be forced upon Nielsen. Niel-[1109]sen further alleges that Local 2569 and IAM International have not acted toward the Plaintiff with complete honesty and good faith, but have acted arbitrarily and dishonestly toward him and have discriminated against him for impermissible purposes. (Complaint ¶ 24.)

I. *The Union Security Clause Is Not Facially Invalid.*

The court construes Plaintiff's first claim for relief as an allegation that Local 2569, in concert with Mercy Ambulance, has violated its duty of fair representation by negotiating and maintaining a union security agreement clause which purportedly requires Nielsen, as a condition of his employment, to pay more than that portion of union dues and fees attributable to the union's representational activities. While direct challenges under § 8(a)(3) are subject to the primary jurisdiction of the National Labor Relations Board ("NLRB"), *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."), federal courts may decide the merits of a § 8(a)(3) claim "insofar as such a decision [is] necessary to the disposition

of [plaintiff's] duty-of-fair-representation challenge." *Communications Workers of America v. Beck*, 487 U.S. 735, 743, 108 S.Ct. 2641, 2647, 101 L.Ed.2d 634 (1988).

In *Beck*, plaintiff-employees claimed that the union failed to represent their interests fairly by negotiating and enforcing an agreement that allowed the exaction of funds for purposes that did not serve the employees' interests and in some cases were contrary to their personal beliefs. 487 U.S. at 743, 108 S.Ct. at 2647-48. The necessity of deciding the scope of § 8(a)(3) in *Beck* arose because the union sought to defend itself on the ground that § 8(a)(3) authorized such an agreement. 487 U.S. at 743, 108 S.Ct. at 2648. Under those circumstances, the Supreme Court held that "the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by the [employees'] duty-of-fair-representation claim." 487 U.S. at 744, 108 S.Ct. at 2648.

Likewise, in the present case plaintiff has alleged that Local 2569 violated its duty of fair representation by negotiating and maintaining a union security agreement clause which is facially invalid because it purportedly requires Nielsen to pay more than that portion of union dues and fees attributable to the union's representational activities. Defendant Unions have responded that the clause is valid under § 8(a)(3). Like *Beck*, "under these circumstances ... [we] have jurisdiction to decide the § 8(a)(3) question raised by respondents' duty-of-fair-representation claim." 487 U.S. at 744, 108 S.Ct. at 2648.

Section 8(a)(3) of the NLRA provides in pertinent part that,

> (a) It shall be an unfair labor practice for an employer —
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall

> preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.... *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization ... if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership....

29 U.S.C. § 158(a)(3). Thus, Congress explicitly allowed for employers to make agreements with unions requiring union membership as a condition of employment under certain circumstances.

[1110]*In Beck*, the Supreme Court interpreted this statute and held the following:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." (citations omitted) The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

487 U.S. at 745, 108 S.Ct. at 2648. The *Beck* Court, in an opinion authored by Justice Brennan, discussed extensively the similarities between § 8(a)(3) of the NLRA and § 2, Eleventh of

the RLA, referring to them as "statutory equivalents," 487 U.S. at 745, 108 S.Ct. at 2649, and noted that in both statutes, "Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost." 487 U.S. at 746, 108 S.Ct. at 2649. Thus, in arriving at its decision in *Beck*, the Court relied heavily on its prior decisions in *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) ("[Section] 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," but that it was not Congress' intent "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."); and *Ellis v. Brotherhood Railway, Airline and Steamship Clerks*, 466 U.S. 435, 447-48, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984) (" 'Congress' essential justification for authorizing the union shop' limits the expenditures that may properly be charged to nonmembers under § 2, Eleventh to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.' ")

Relying on these cases and the legislative history of § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA, the Supreme Court concluded that

> § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues."

Beck, 487 U.S. at 762-63, 108 S.Ct. at 2657.

The holding of *Beck* did not, as plaintiff contends, pertain to the facial validity of a union-security agreement, but rather to the

enforcement of such an agreement. The Supreme Court noted that "we have never before delineated the precise limits § 8(a)(3) places on the *negotiation and enforcement* of union-security agreements ..." 487 U.S. at 744, 108 S.Ct. at 2648. Again, there is no reference to determining the facial validity of the language contained in the agreement; the focus is on the what interpretation the union gives to the language of the agreement.

Additionally, the two cases that the Supreme Court relies heavily upon in *Beck—Street*[3] and *Ellis*—expressly state that they were not deciding the facial validity of the agreements at issue. The *Street* Court found: "[T]he union-shop agreement itself is not unlawful ..." 367 U.S. at 771, 81 S.Ct. at 1801. In *Ellis*, the Court noted: "[Petitioners] do not contest the legality of the union shop as such, nor could they.... They do contend, however, that they can be *compelled to contribute* no more than their pro rata share ..." 466 U.S. at 439, 104 S.Ct. at 1887-88 (emphasis added) (citations omitted).

In a recent United States Court of Appeals case from the D.C. Circuit, the court addressed a union-security agreement requiring bargaining unit employees to become and remain "members of the Union in good standing." *IUE v. NLRB*, 41 F.3d 1532 (D.C.Cir.1994). In *IUE*, the court held that the facts in the case did not make out a **[1111]**breach of the duty of fair representation, as there was no basis in the record to support the NLRB's finding that the Union engaged in bad faith conduct. 41 F.3d at 1538. In addressing petitioner's argument that the union-security agreement was facially invalid, the D.C. Circuit stated the following:

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[3] The Beck court stated, "Our decision in *Street*, however, is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745, 108 S.Ct. at 2649.

> [Petitioner's] contention is without merit. Contrary to his claim, *Pattern Makers['League v. NLRB*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985)] and *Beck* in no way compel the conclusion that union-security agreements requiring "membership in the union in good standing" are unlawful on their face. *Beck* speaks only to the level of dues an employee may lawfully be required to pay under a union-security agreement. *Pattern Makers* stands only for the proposition that unions may not require full union membership as a condition of employment and may not restrict an employee's right to resign from full membership in the union. *Neither case has anything to do with what language is permissible in a union-security agreement* and, as such, neither case supports [petitioner's] claim.

41 F.3d at 1539 (emphasis added). As specifically noted by the D.C. Circuit, *Beck* has nothing to do with what language is permissible in a union-security agreement, but addresses only the amount of dues an employee may be required to pay under a union-security agreement. *Id.*

The plaintiff tries to distinguish *IUE* from the present situation. First, Plaintiff quotes the following passage from *IUE*,

> In fact from this date forward unions are on notice that they risk breaching their duty of fair representation if they adopt union security provisions of the sort at issue here without appropriate "notice" to employees who are covered by such provisions.

41 F.3d at 1534, and concludes that the D.C. Circuit recognized the illegality of "overly expansive union security clauses" in future cases. (Plaintiff's Memorandum in Support of the Motion for Summary Judgment, p. 13, n. 7.) This passage, however, only indicates that the unions may risk breaching their duty of fair representation, not that union security agreements may be struck

as facially invalid. With regard to the facial validity of the agreement, the court states in the very same paragraph as the above-quoted passage that "there is no basis for [petitioner's] claim that the union-security provision at issue in this case is facially invalid under Supreme Court precedent." 41 F.3d at 1534; see also *id.* at 1538-39. Furthermore, the quoted passage from *IUE* states that unions risk breaching their duty if they adopt such clauses *without* appropriate notice to employees. Here, the employees were given appropriate notice through annual publication in *The Machinist*.

Plaintiff also claims that *IUE* is "poorly reasoned and internally inconsistent" because it describes *Beck* as the Supreme Court's "most recent pronouncement in this area," 41 F.3d at 1535, and then later states that *Beck* has nothing to do with "what language is permissible in a union security agreement." 41 F.3d at 1539. The failure to see the consistency in these statements further evidences Plaintiff's misinterpretation of *Beck*. *Beck* still is the most recent Supreme Court case on this issue, holding that "§ 8(a)(3) does not oblige employers 'to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.' " 41 F.3d at 1535 (quoting *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648-49). Yet there is a crucial difference between what the union actually enforces against employees and what language in a collective bargaining agreement is facially valid. *Beck* did not reach the latter issue. *IUE* is not, as Plaintiff suggests, "poorly reasoned and internally inconsistent," but is an accurate application of the *Beck* holding.

Plaintiff cites a recent Eighth Circuit case, *Bloom v. National Labor Relations Board*, 30 F.3d 1001 (8th Cir.1994), for his position that the union security clause should be stricken from the agreement. The union security clause at issue in *Bloom* reads as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees **[1112]**subsequently hired shall make application and become members of the Union within thirty-one (31) days.

Bloom v. National Labor Relations Board, 30 F.3d 1001, 1002 (8th Cir.1994). The court in *Bloom* noted that the Union did not advise Bloom that he could object to having union dues and fees spent on nonrepresentational activities and be charged only the percentage spent on representational activities. *Id.* "Instead, Local 12 advised Bloom that the collective bargaining agreement required that he be a member of the union and that if he did not complete the membership application and the dues checkoff card Local 12 would request that Group Health terminate him." *Id.* The Eighth Circuit concluded that, "[b]ecause the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in this case requires expunction of the offending clause." *Id.* at 1004.

The facts in *Bloom* are inapposite to those in the present case. Key to the Eighth Circuit's decision was the fact that the Union did not advise Bloom that he could object to having his dues spent on nonrepresentational activities. In the case at hand, Nielsen was advised by the Union of his right to object and the procedures for objecting. The clause was expunged in *Bloom* because the Eighth Circuit found that it was "unlawfully interpreted and applied" by the Union. In the present case, the clause was not unlawfully interpreted and applied. Contrary to Plaintiff's contentions, *Bloom* is not applicable to this case.

Additionally, *Price v. Auto Workers Local 571*, 927 F.2d 88 (2nd Cir.1991), does not support Nielsen's position. In *Price*, the Second Circuit concluded that the Union did not violate its duty of fair representation because post-*Beck* procedures

implemented by the Union were "more than adequate" to meet the fair representation standard: the procedures employed were not arbitrary, discriminatory, or implemented in bad faith. 927 F.2d at 92. *Price* did not address the facial validity of the union security agreement, and Nielsen's attempt to cite *Price* for such a proposition is not well-taken. Moreover, in *Price*, the Second Circuit affirmed a judgment *dismissing* the dues objectors' claims, and left intact and enforceable the union security clause, a conclusion that hardly supports Nielsen's claims.

Finally, Plaintiff cites *NLRB v. Manitowoc Engineering Co.*, 909 F.2d 963 (7th Cir.1990), in support of his position that the clause in the union security agreement is facially invalid because it overstates the maximum obligation that may be required of employees. The collective bargaining agreement in *Manitowoc* required employees who were promoted to supervisor status to maintain union membership (or obtain a withdrawal card) in order to preserve the right to return to work in the bargaining unit with the seniority that accrued during their earlier employment. 909 F.2d at 963. The Seventh Circuit affirmed the NLRB's conclusion that the agreement was invalid on its face because § 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 909 F.2d at 967 (quoting 29 U.S.C. § 158(a)(3)). The NLRB found that with respect to seniority and employment, the agreement "mandates disparate treatment with respect to employment for employees returned to the bargaining unit on the basis of whether or not those employees made the required acquisition." 909 F.2d at 963. The NLRB further found that this disparate treatment encourages union membership. *Id.* The Seventh Circuit held that "nothing seems more reasonable than the Board's conclusion that the distinction created by [the agreement] results in disparate treatment–discrimination–in regard to protected employment (and protected employees)." 909 F.2d at 969.

Manitowoc is distinguishable from the present case and does not support Nielsen's position. The union security agreement clause here has to do with dues requirements, while the portion of the agreement at issue in *Manitowoc* dealt with the unique situation where an employee of the bargaining unit was promoted out of the unit and the steps the employee needed to take (while not a member of the unit) in order to retain seniority upon re-entering the unit. In addi-[1113]tion, the union security clause at hand does not cover individuals who are no longer represented by the Union, and it does not require membership in the union as a condition precedent to the retention of previously accrued seniority rights. Therefore, *Manitowoc* does not support the plaintiff's position.

In sum, the union security agreement clause is not facially invalid. Nothing in the language of § 8(a)(3) or in the case law supports the plaintiff's proposition that the clause is illegal on its face. Therefore, defendant Unions' Motion for Summary Judgment is granted.

II. *The Union Defendants Have Not Violated Their Duty of Fair Representation By Enforcing the "Window Period" for Filing Beck Objections.*

In his second claim for relief, Nielsen asserts that enforcement of the union security clause violates the duty of fair representation because it forces him to pay in excess of his *pro rata* share of the unions' cost of representation, and thereby imposes an obligation which may not be forced upon him. Specifically, the Plaintiff challenges the one-month window period during which employees must file their *Beck* objection to the payment of full dues, claiming that this is an arbitrary process implemented by the Union and one which is not authorized by *Beck*. (Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 15.)

Union Defendants claim that the thirty-day window is critical to the Union's ability to administer the objector program, because without a limited period for filing and processing objections the program would be unworkable. Each annual objection necessitates revisions in the records of three organizations, each of which is entitled to a percentage of the fees which must be reduced: the local union, the intermediate union or district lodge, and the International Union. Objections can potentially come from any of the 1300 local unions, representing approximately 500,000 employees, and currently it costs IAM over $200,000.00 to operate its dues reduction system. Under the IAM procedures, each objector has an opportunity to challenge the fee reduction calculation in a union-funded arbitration procedure. Without the thirty-day window period, the Union Defendants claim that they would be unable to process objector claims in an orderly fashion, or to conduct the required audits on any schedule.

A union's duty of fair representation is a judicially implied duty which arises from 29 U.S.C. §§ 158(b), 159(a) (1988), Sections 8(b) and 9(a) of the NLRA. *Price*, 927 F.2d at 92. "This duty requires a union to 'represent fairly the interest of all bargaining-unit members during the negotiation, administration and enforcement of collective-bargaining agreements.' " *Id.* (quoting *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47, 99 S.Ct. 2121, 2125, 60 L.Ed.2d 698 (1979)). A breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). As the Supreme Court noted in *Beck*, this duty "extends not only to the negotiation of the collective-bargaining agreement itself but also to the subsequent enforcement of that agreement, including the administration of any grievance procedure the agreement may establish." *Beck* 487 U.S. at 739, 108 S.Ct. at 2645 (citing *Vaca v. Sipes*, 386 U.S. at 177, 87 S.Ct. at 910). The duty of fair representation allows a wide range of reasonableness, and review

of the Union Defendants actions must be highly deferential. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67-69, 76-78, 111 S.Ct. 1127, 1130, 1135, 113 L.Ed.2d 51 (1991). The court can find a breach of this duty only if the Union's actions "can be fairly characterized as so far outside a 'wide range of reasonableness,' ... that [those actions] are wholly 'irrational' or 'arbitrary.' " *Id.* (citations omitted). In *O'Neill*, the Supreme Court stated,

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examina-**[1114]**tion of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.

Id. at 78, 111 S.Ct. at 1135.

Beyond conclusory statements that the 30-day window period is arbitrary and discriminatory, Nielsen fails to address the legal standard for the duty of fair representation and does not explain *how* the window period is arbitrary, discriminatory, or in bad faith. Nielsen does not demonstrate how the utilization of a 30-day window period is "so far outside a 'wide range of reasonableness ... that [the Unions' actions] are 'irrational' or 'arbitrary.' " *See id.* Nielsen suggests that the Unions could operate the dues objector system without the window period, but this does not demonstrate that the current system is "irrational" or "arbitrary." In response to the Unions' claim that without the window period, it would be impossible to implement any sensible arbitration process, Nielsen states that he has never attempted to invoke the arbitration procedure. Yet this argument does not change the fact that the Unions are responsible for implementing a system that covers all the represented employees. In addition,

Nielsen attacks the annual notice in *The Machinist* as being "typed in ultra-fine print, and buried in the unions' internal magazine...." (Plaintiff's Memorandum in Opposition to Union Defendants' Motion for Summary Judgment, p. 14.) Upon review of an actual copy of the December 1993 issue of *The Machinist*, the court finds that the notice is well-marked, as it is listed in the table of contents on the second page, and is printed in legible type and highlighted in green on the seventh page. (The entire magazine is only eight pages in length.) In sum, Nielsen has done nothing to demonstrate that the Union Defendants' actions were arbitrary, discriminatory, or in bad faith, such that they breached their duty of fair representation.

This conclusion is supported by the decisions of courts that have already reviewed window periods. In *Abrams v. Communications Workers of America*, 818 F.Supp. 393, 403 (D.D.C.1993), on appeal, No. 93-7171 (D.C.Cir.1995), Communications Workers of America ("CWA") had instituted a fee objection policy for nonmembers through which nonmembers would be notified of their right to file objections in the March issue of the *CWA News*, a publication sent to all employees. 818 F.Supp. at 397. The policy called for objections to be made during the month of May. *Id.* The court concluded the following in granting summary judgment in favor of CWA on this claim:

> CWA's requirement that nonmembers repeat their objections every year during a specified time period provides an efficient yet fair system for objection. Because objection is not to be presumed, *Street*, 367 U.S. at 774, 81 S.Ct. at 1802-03, CWA has a valid basis for requiring yearly objections. Nor can the objection period be never ending if CWA wishes to resolve nonmembers' disputes, tally its budget, and put the advance reduction process into motion. CWA's procedure is not arbitrary but reasoned, and its basis in law shows the procedure also is not discriminatory or in bad faith. The court concludes that CWA's requirement of

> annual objections during a limited window period does not violate its duty of fair representation.

818 F.Supp. at 403.

Likewise, IAM's procedure that requires dues objectors to make their objections during a thirty-day window is "not arbitrary but reasoned, and its basis in law shows the procedure also is not discriminatory of in bad faith." *See id.* Union Defendants have not violated their duty of fair representation by requiring objections to be filed during a limited window period. As the Defendant Unions assert, and as the court in *Abrams* recognized, the objection period cannot be never-ending if the Union wishes to process objectors' claims, tally its budget, conduct audits, and resolve nonmembers' disputes in an orderly fashion.

Further support for Union Defendants' position is found in *Kidwell v. Transportation Com. Intern. Union*, 731 F.Supp. 192 (D.Md.1990), in which the court held that the annual renewal of objections and the thirty-day window for objecting to the Union's proposed fee were not "unduly restrictive of plaintiff's **[1115]** rights." *Id.* at 205. In finding that the thirty-day window for making objections was "not unreasonable," the court noted the following:

> [T]he union is not required to provide the least restrictive procedure imaginable. The union, as well as the employees, have an interest in the prompt resolution of obligations and disputes. The 30-day window facilitates prompt resolution and leaves no doubt as to the timing or the requirement for making an objection.

Id. (citing *Andrews v. Education Ass'n of Cheshire*, 653 F.Supp. 1373, 1378 (D.Conn.) (approving a 30-day objection period), *aff'd*, 829 F.2d 335 (2d Cir.1987)).

Additionally, in a Memorandum issued by the NLRB General

Counsel, the NLRB appears to endorse window periods for filing objections, so long as the annual notice to employees sets forth that information and the time period is "reasonable." *See* NLRB General Counsel Memorandum, "Guidelines Concerning *CWA v. Beck*, [487] U.S. [735] [108 S.Ct. 2641, 101 L.Ed.2d 634], 128 LRRM 2729 (June 29, 1988)," (November 15, 1988). Likewise, Nielsen and other employees in the collective bargaining unit receive annual notice through *The Machinist*, and a month-long period for objecting is a reasonable time period.

Plaintiff Nielsen contends that "there is no basis in *Beck*" for imposing a window period for objections to member dues. However, in *Beck* the union had no dues objector procedures at all, as it (the union) was arguing that there was no dues objector right under the NLRA. *Beck* does not address what type of procedures a union may adopt in administering a dues objector program, other than stating that such claims should be resolved under the deferential duty-of- fair-representation standard. Thus, plaintiff's reliance on *Beck* for this proposition is misplaced.

Nielsen also claims that unions may not restrict resignations from union membership to a specific time of year, and that the Unions' "window period" policy has practically nullified Nielsen's right to resign at will, a right upheld in *Pattern Makers*. Yet it is not the case that the Union has restricted Nielsen's ability to resign, which is an entirely different issue than that presently before the court. In fact, there is no dispute that Nielsen resigned on July 5, 1994, and his resignation was accepted immediately by Local 2569's president, Rebecca Smith, as indicated in a July 22, 1994 letter to Nielsen.

Finally, Plaintiff cites a decision of an NLRB Administrative Law Judge, *California Knife and Saw Works (International Association of Machinists & Aerospace Workers)*, JD(SF)-052-92 (1992), in which the ALJ found that,

> the Unions' policy of restricting the time when union member resignees may invoke *Beck* rights to the month of January each year is an overly broad restriction on employees' Section 7 right to refrain from supporting their collective bargaining representatives' nonrepresentational expenditures. I further find that such restrictions violate the [Unions'] duty of fair representation ...

(Page 41 of decision.) This court does not find the ALJ's opinion persuasive in its application of the deferential duty-of-fair-representation standard.

As noted earlier, a breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 87 S.Ct. 903, 916, 386 U.S. 171, 190, 17 L.Ed.2d 842 (1967). Also, the duty of fair representation allows a wide range of reasonableness, and review of the Union's actions must be highly deferential. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67-69, 76-78, 111 S.Ct. 1127, 1130, 1135, 113 L.Ed.2d 51 (1991). Nielsen has in no way demonstrated that the Union was arbitrary, discriminatory, or acting in bad faith by enforcing the procedures for making *Beck* objections, including implementing the thirty-day time window. Additionally, the case law supports that such a window period does not violate the unions' duty of fair representation. Accordingly, Plaintiff Nielsen's Motion for Summary Judgment is denied and Union Defendants' Motion for Summary Judgment is granted.

[1116]CONCLUSION

For the foregoing reasons, Defendant Unions' Motion for Summary Judgment is GRANTED and Plaintiff Nielsen's Motion for Summary Judgment is DENIED. In addition, Plaintiff's Request for Oral Argument is DENIED.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Granting Defendant Employer's Motion to Dismiss)

June 21, 1995

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895 F. Supp. 1093
150 L.R.R.M. 2852

Jeffrey NIELSEN, Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569, International Association of Machinists & Aerospace Workers, AFL-CIO-CLC, Mercy Ambulance of Fort Wayne, Inc., Defendants.

No. 1:94-cv-337.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

June 21, 1995.

* * * *

[1094]*ORDER*

WILLIAM C. LEE, District Judge.

This matter is before the court on Mercy Ambulance of Fort Wayne, Inc.'s January 17, 1995, Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. On February 6, 1995, Plaintiff Nielsen filed his Brief in Opposition to the Motion to Dismiss, and on February 14, 1995, Mercy Ambulance filed its Reply. For the following reasons, Mercy's Motion to Dismiss the Complaint is granted.

[1095]*FACTUAL BACKGROUND*

Plaintiff Jeffrey Nielsen is employed by Mercy Ambulance of Fort Wayne, Inc. Local Lodge 2569 is the exclusive representative of a bargaining unit of Mercy Ambulance employees, including Nielsen. Mercy Ambulance and Local Lodge 2569 are parties to a current collective bargaining agreement. The agreement contains a provision which provides in pertinent part as follows:

> Section 1. Agency Shop:
>
> As a condition of continued employment, all employees included within the unit described in Article II [sic] of this Agreement shall either become a member of the Union and pay dues thereto, or in lieu thereof, shall pay an amount equal to the Union's initiation fee and shall thereafter pay to the Union each month, either directly or through payroll deduction, an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union. This obligation shall begin on the first day of the month following completion of six (6) months' employment.
>
> Each member of the bargaining unit covered by this Agreement who has not become a member of the Union, or in lieu thereof, has not tendered the equivalent of Union dues as provided above, within seven (7) days of the first day of any month following the effective date of this Agreement or completion of his/her sixth month of employment, shall be notified by the Union by certified mail, with a copy to the Company's Director of Operations, that failure to pay either dues or agency shop fees within ten (10) days following receipt of such notice shall result in termination of employment. Should the employee fail to make such payment with [sic] the ten-day period, the Company shall,

> within three (3) working days after receipt of notice by certified mail from the Union, discharge such employee.

(Complaint ¶ 11.)

Shortly after being hired by Mercy Ambulance, Plaintiff Nielsen joined the IAM International and its Local 2569 as a member in good standing. On or about July 5, 1994, Plaintiff Nielsen sent a letter to Local 2569 resigning from membership in the unions and invoking his right to be allowed to pay "reduced dues" pursuant to *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). On or about July 22, 1994, Local 2569, by and through its president, Rebecca Smith, sent Plaintiff Nielsen a response indicating that while his resignation from union membership was "accepted," Local 2569 was "in no position to act upon your request to become a fee objector." (Complaint ¶ 14.) The letter also stated: "If you wish to pursue this matter further, I suggest you take the matter up with the General Secretary-Treasurer directly," referring to IAM International's General Secretary-Treasurer. (Complaint ¶ 14.)

On or about August 16, 1994, Plaintiff Nielsen sent a letter to Donald E. Wharton, General Secretary-Treasurer of the IAM International, stating in part:

> I hereby notify you that I wish to be a "financial core objector" only, in accordance with the Supreme Court's decision in *CWA v. Beck*, [487 U.S. 735], 108 S.Ct. 2641 [101 L.Ed.2d 634] (1988).
>
> I object to the collection, as well as the use, of any of my money for any purposes other than paying my pro rata share of your *direct* expenses for fulfilling your *limited* statutory duty under § 9(a) of the NLRA to engage in collective bargaining, contract administration and grievance

> processing for the unit of employees at in [sic] which I am employed.

(Complaint ¶ 16; Exhibit 4 to the Complaint.)

On or about August 24, 1994, Defendant IAM International, by and through its General Secretary-Treasurer, Donald E. Wharton, responded to Nielsen that his objection to the amount of dues and fees that he was required to pay was "not properly perfected under the guidelines set forth in the Official Notice in the December, 1993 issue of *The Machinist*." Specifically, the Wharton correspondence stated that Nielsen's request "was not postmarked or received during the appropriate 30 day period." (Complaint ¶ 17; Exhibit 5 to the Complaint.) Since July 5, 1994, Mercy Ambulance has continued to deduct from Plaintiff Nielsen's salary an **[1096]**amount of money equal to the full union dues that voluntary members of the unions pay. IAM International uses some of the money collected from Plaintiff Nielsen for non-representational activities.

The first claim for relief in Nielsen's Complaint is made jointly against both Local 2569 and Mercy Ambulance. Plaintiff Nielsen claims that,

> Defendant Local Lodge 2569, in concert with Mercy Ambulance, has violated the
>
> > National Labor Relations Act and the fiduciary duty of fair representation that it owes to plaintiff Nielsen ... by negotiating and maintaining [the] union security clause.... That clause is facially invalid because it purports to require the Plaintiff, as a condition of his employment, to pay more than "that portion of union dues and fees attributable to the union's representational activities."

(Complaint ¶ 20.) The plaintiff further claims that the union security clause is facially invalid because it misrepresents the extent and actual limits of the obligation which may be imposed upon them, and by negotiating and maintaining this clause subsequent to *Beck*, Local 2569 has not acted toward Plaintiff and other employees with complete honesty and good faith, but has acted arbitrarily and dishonestly by overstating the limits of their obligation to the union. (Complaint ¶ 21.) Finally, in the first claim for relief, Plaintiff alleges that "Mercy Ambulance, in concert with Defendant Local Lodge 2569, has violated the National Labor Relations Act, as construed by *Beck*, by negotiating and maintaining a union security clause which requires Plaintiff Nielsen, as a condition of his employment, to pay more than 'that portion of union dues and fees attributable to the union's representational activities.' " (Complaint ¶ 22.)

The Plaintiff's second claim for relief alleges that the Union Defendants have enforced the union security provision by requiring the Plaintiff to continue, as a condition of his employment, to pay amounts equal to the dues paid by voluntary union members. (Complaint ¶ 23.) The Plaintiff claims that enforcement of the union security clause violates the duty of fair representation because it forces Nielsen to pay in excess of his *pro rata* share of the unions' cost of representation, and thereby imposes an obligation which may not be forced upon Nielsen. Nielsen further alleges that Local 2569 and IAM International have not acted toward the Plaintiff with complete honesty and good faith, but have acted arbitrarily and dishonestly toward him and have discriminated against him for impermissible purposes. (Complaint ¶ 24.)

STANDARD

In deciding a motion to dismiss for failure to state a claim, this court must take the well-pleaded factual allegations of the plaintiff's complaint as true. *Ashbrook v. Hoffman*, 617 F.2d 474

(7th Cir.1980). The complaint must be considered in the light most favorable to the plaintiff and every doubt must be resolved in the plaintiff's favor. *Henry C. Beck Co. v. Fort Wayne Structural Steel*, 701 F.2d 1221 (7th Cir.1983). Dismissal is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir.1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Nonetheless, a complaint "must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory." *Papapetropoulous v. Milwaukee Transport Services*, 795 F.2d 591, 594 (7th Cir.1986). "The heavy costs of modern federal litigation ... counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint." *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir.1984).

DISCUSSION

Mercy maintains (and Nielsen appears to concede) that the second claim for relief does not assert a cause of action against Mercy. *See* Plaintiff Nielsen's Brief in Opposition to Defendant Mercy Ambulance's Motion to Dismiss, p. 4, n. 2 ("The Complaint's second claim for relief deals with the Union Defen-**[1097]**dant's enforcement of the "fees equal to dues" requirement and their rejection of Plaintiff Nielsen's *Beck* objections. This second claim for relief only indirectly implicates Mercy Ambulance."). The court agrees that the second claim for relief does not state a claim against Mercy Ambulance, and accordingly, the only inquiry before the court is whether the first claim for relief states a cause of action against Mercy.

To the extent that Plaintiff Nielsen is directly challenging the language of the agreement as violating § 8(a)(3) of the NLRA, 29

U.S.C. § 158(a)(3), this court does not have subject matter jurisdiction over the claim. However, while direct challenges under § 8(a)(3) are subject to the primary jurisdiction of the National Labor Relations Board ("NLRB"), *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."), federal courts may decide the merits of a § 8(a)(3) claim "insofar as such a decision [is] necessary to the disposition of [plaintiff's] duty-of-fair-representation challenge." *Communications Workers of America v. Beck*, 487 U.S. 735, 743, 108 S.Ct. 2641, 2647, 101 L.Ed.2d 634 (1988). In *Beck*, plaintiff-employees claimed that the union failed to represent their interests fairly by negotiating and enforcing an agreement that allowed the exaction of funds for purposes that did not serve the employees' interests and in some cases were contrary to their personal beliefs. 487 U.S. at 743, 108 S.Ct. at 2647-48. The necessity of deciding the scope of § 8(a)(3) in *Beck* arose because the union sought to defend itself on the ground that § 8(a)(3) authorized such an agreement. 487 U.S. at 743, 108 S.Ct. at 2648. Under those circumstances, the Supreme Court held that "the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by the [employees'] duty-of-fair-representation claim." 487 U.S. at 744, 108 S.Ct. at 2648.

The question is whether Nielsen has asserted an appropriate cause of action with an appropriate jurisdictional basis, such that the validity of the union security agreement clause under § 8(a)(3) is properly raised. Nielsen claims that his suit asserts "that Mercy Ambulance, while not 'breaching' the contract in the traditional sense, has entered into and enforced a contract which is facially invalid under *Beck* and *Bloom* and fully participated with the IAM unions in their violations." (Plaintiff Nielsen's Brief in Opposition to Defendant Mercy Ambulance's Motion to

Dismiss, p. 15.)[1] Therefore, Nielsen maintains that his suit is "quite similar to both *Beck* and the hybrid § 301/DFR suits against unions and employers." *Id.*

Section 301 of the LMRA, 29 U.S.C. § 185(a), provides in pertinent part the following:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties....

29 U.S.C. § 185(a).

The plaintiff cites *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2291, 76 L.Ed.2d 476 (1983), for the proposition that the two claims in a hybrid § 301/duty of fair representation case are "inextricably interdependent." However, while the methods of proving the two claims may be very similar, a hybrid suit actually consists of two *separate* claims. As the *DelCostello* Court recognized,

> [s]uch a suit, as a formal matter, comprises two causes of action. *The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement.* The suit against the union is one for breach of the union's duty of fair representation, which is im-**[1098]**plied under the scheme of the National Labor Relations Act.

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[1]With regard to Union Defendants, Nielsen claims that his suit asserts "that the IAM unions violated the NLRA and the duty of fair representation by 'negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve [his] interests and in some cases are contrary to [his] personal beliefs.' " *Id.*

462 U.S. at 164, 103 S.Ct. at 2290 (emphasis added). Thus, the employee must adequately allege a § 301 cause of action against the employer for the claim to survive, regardless of whether the suit is a "hybrid." *See also Vaca v. Sipes*, 386 U.S. 171, 183-83, 87 S.Ct. 903, 913, 17 L.Ed.2d 842 (1967) (noting that under § 301 of the LMRA, "courts have jurisdiction over suits to enforce collective bargaining agreements even though *the conduct of the employer which is challenged as a breach of contract* is also arguably an unfair labor practice within the jurisdiction of the NLRB.")

Plaintiff cites the Supreme Court case of *Smith v. Evening News Association*, 371 U.S. 195, 200, 83 S.Ct. 267, 269-70, 9 L.Ed.2d 246 (1962), in support of his position that § 301 "should not be interpreted so narrowly that jurisdiction over an employer is permitted only in cases where the contract is 'violated,' as opposed to situations where the contract is alleged to be facially unlawful." (Plaintiff Nielsen's Brief in Opposition to Defendant Mercy Ambulance's Motion to Dismiss, p. 16.) However, in *Smith* the plaintiff was suing his employer for an actual breach of a non-discrimination clause. 371 U.S. at 196, 83 S.Ct. at 268. The Supreme Court held that the NLRB necessarily does not have exclusive jurisdiction to deal with an unfair labor practice which also violates a collective bargaining contract. 371 U.S. at 197, 83 S.Ct. at 269. Because the cause of action in *Smith* proceeded based on plaintiff's allegation of the employer's breach of the collective bargaining agreement, this case does not support Nielsen's contention that a breach is not necessary to proceed under § 301.

Nielsen claims that courts have accepted subject matter jurisdiction over employers in identical circumstances, citing *Breininger v. Sheet Metal Workers International Association, Local Union No. 6*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989), *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970); and *Price v. UAW*, 722 F.Supp. 933, 940

(D.Conn.1989)[2]. Nielsen's statement that an employer may be implicated for participating in a union's breach of the duty of fair representation is not incorrect; however, the plaintiff still must state a valid cause of action when an employer may be implicated in the union's wrongful conduct. In *Czosek v. O'Mara*, the Supreme Court simply found that it could not consider whether employers may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation, because the issue was not raised before the Court of Appeals and the union was not materially prejudiced. 397 U.S. at 30, 90 S.Ct. at 773-73. This case does not support plaintiff Nielsen's claim that "courts have accepted subject matter jurisdiction over employers in identical circumstances." (Plaintiff's Brief, p. 17.)

The plaintiff also inappropriately relies on *Breininger v. Sheet Metal Workers Intern.*, 493 U.S. 67, 80-84, 110 S.Ct. 424, 433-35, 107 L.Ed.2d 388 (1989). In *Breininger*, the Supreme Court simply held that while practical considerations may militate in favor of "having the same entity adjudicate a joint claim against both the employer and the union when a wrongfully discharged employee who has not obtained relief through any exclusive grievance and arbitration procedures provided in the collective-bargaining agreement brings a breach-of-contract action against the employer pursuant to § 301(a) of the LMRA," a fair representation action against the union does not *require* a

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[2] Plaintiff's citation to *Price v. International Union, UAW*, 722 F.Supp. 933 (D.Conn.1989), does not support his position. In *Price*, the District of Connecticut held that "[i]t is well established that an employer can be held responsible for violating the NLRA when it 'participates' with a union in arbitrary or unfair activity." 722 F.Supp. at 940. However, *Price* did not hold that the plaintiff is alleviated from having to state a valid cause of action against the employer who may be responsible for violating the NLRA.

concomitant claim against an employer for breach of contract. *Id.* Interestingly, the Supreme Court states the following:

> Indeed, the earliest fair representation suits involved claims against unions for breach of the duty in *negotiating* a collec-**[1099]**tive-bargaining agreement, *a context in which no breach-of-contract action against an employer is possible*.

493 U.S. at 80, 110 S.Ct. at 433 (emphasis added). As the Supreme Court notes, there is no possible action under § 301 of the LMRA for a breach of contract when the claims against the union are for a breach of the duty in actually negotiating the agreement. Yet this is what the plaintiff is attempting to allege: a § 301 cause of action for *negotiating* and maintaining the union security agreement clause.

In sum, this case is not like *Beck*, where the union was sued for a violation of its duty of fair representation (an appropriate jurisdictional basis), raised the § 8(a)(3) issue as a defense, and the Court undertook a "collateral" analysis of § 8(a)(3). In the present case, Nielsen has failed to establish the existence of a valid underlying cause of action through which Mercy might then raise the § 8(a)(3) issue, as in *Beck*. Because Nielsen has not properly alleged a § 301 action, or indeed any action, against Mercy Ambulance, Mercy's Motion to Dismiss is granted[3].

Moreover, the union security agreement clause is not facially invalid. Section 8(a)(3) of the NLRA provides in pertinent part that,

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[3] Nielsen also contends that Mercy Ambulance is an indispensable party under Rule 19(a), Federal Rules of Civil Procedure. However, because this court is granting Union Defendants' Motion for Summary Judgment and Defendant Mercy Ambulance's Motion to Dismiss, the issue of whether Mercy Ambulance is an indispensable party is moot.

> (a) It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.... *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization ... if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership....

29 U.S.C. § 158(a)(3). Thus, Congress explicitly allowed for employers to make agreements with unions requiring union membership as a condition of employment under certain circumstances.

In *Beck*, the Supreme Court interpreted this statute and held the following:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." (citations omitted) The statutory question presented in this case, then, is whether this "financial core" includes the obligation

> to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

487 U.S. at 745, 108 S.Ct. at 2648. The *Beck* Court, in an opinion authored by Justice Brennan, discussed extensively the similarities between § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA, referring to them as "statutory equivalents," 487 U.S. at 745, 108 S.Ct. at 2649, and noted that in both statutes, "Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost." 487 U.S. at 746, 108 S.Ct. at 2649. Thus, in arriving at its decision in *Beck*, the Court relied heavily on its prior decisions in *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) ("[Section] 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and adminis-**[1100]**tering collective agreements, and the costs of the adjustment and settlement of disputes," but that it was not Congress' intent "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."); and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 447-48, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984) (" 'Congress' essential justification for authorizing the union shop' limits the expenditures that may properly be charged to nonmembers under § 2, Eleventh to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.' ")

Relying on these cases and the legislative history of § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA, the Supreme Court concluded that

> § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive

representative of the employees in dealing with the employer on labor management issues."

Beck, 487 U.S. at 762-63, 108 S.Ct. at 2657.

The holding of *Beck* did not, as plaintiff contends, pertain to the facial validity of a union-security agreement, but rather to the *enforcement* of such an agreement. The Supreme Court noted that "we have never before delineated the precise limits § 8(a)(3) places on the *negotiation and enforcement* of union-security agreements ..." 487 U.S. at 744, 108 S.Ct. at 2648. Again, there is no reference to determining the facial validity of the language contained in the agreement; the focus is on the what interpretation the union gives to the language of the agreement.

Additionally, the two cases that the Supreme Court relies heavily upon in *Beck*—*Street*[4] and *Ellis*-expressly state that they were not deciding the facial validity of the agreements at issue. The *Street* Court found: "[T]he union-shop agreement itself is not unlawful ..." 367 U.S. at 771, 81 S.Ct. at 1801. In *Ellis*, the Court noted: "[Petitioners] do not contest the legality of the union shop as such, nor could they.... They do contend, however, that they can be *compelled to contribute* no more than their pro rata share ..." 466 U.S. at 439, 104 S.Ct. at 1887-88 (emphasis added) (citations omitted).

In a recent United States Court of Appeals case from the D.C. Circuit, the court addressed a union-security agreement

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[4]The *Beck* court stated, "Our decision in *Street*, however, is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745, 108 S.Ct. at 2649.

requiring bargaining unit employees to become and remain "members of the Union in good standing." *IUE v. NLRB*, 41 F.3d 1532 (D.C.Cir.1994). In *IUE*, the court held that the facts in the case did not make out a breach of the duty of fair representation, as there was no basis in the record to support the NLRB's finding that the Union engaged in bad faith conduct. 41 F.3d at 1538. In addressing petitioner's argument that the union-security agreement was facially invalid, the D.C. Circuit stated the following:

> [Petitioner's] contention is without merit. Contrary to his claim, *Pattern Makers[' League v. NLRB*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985)] and *Beck* in no way compel the conclusion that union-security agreements requiring "membership in the union in good standing" are unlawful on their face. *Beck* speaks only to the level of dues an employee may lawfully be required to pay under a union-security agreement. *Pattern Makers* stands only for the proposition that unions may not require full union membership as a condition of employment and may not restrict an employee's right to resign from full membership in the union. *Neither case has anything to do with what language is permissible in a union-security agreement* and, as such, neither case supports [petitioner's] claim.

41 F.3d at 1539 (emphasis added). As specifically noted by the D.C. Circuit, *Beck* has nothing to do with what language is permissible in a union-security agreement, but addresses only the amount of dues an employee **[1101]**may be required to pay under a union-security agreement. *Id.*

The plaintiff tries to distinguish *IUE* from the present situation. First, Plaintiff quotes the following passage from *IUE*,

> In fact from this date forward unions are on notice that they risk breaching their duty of fair representation if they adopt

> union security provisions of the sort at issue here without appropriate "notice" to employees who are covered by such provisions.

41 F.3d at 1534, and concludes that the D.C. Circuit recognized the illegality of "overly expansive union security clauses" in future cases. (Plaintiff's Memorandum in Support of the Motion for Summary Judgment, p. 13, n. 7.) This passage, however, only indicates that the unions may risk breaching their duty of fair representation, not that union security agreements may be struck as facially invalid. With regard to the facial validity of the agreement, the court states in the very same paragraph as the above-quoted passage that "there is no basis for [petitioner's] claim that the union-security provision at issue in this case is facially invalid under Supreme Court precedent." 41 F.3d at 1534; *see also id.* at 1538-39. Furthermore, the quoted passage from *IUE* states that unions risk breaching their duty if they adopt such clauses *without* appropriate notice to employees. Here, the employees were given appropriate notice through annual publication in *The Machinist*.

Plaintiff also claims that *IUE* is poorly reasoned and internally inconsistent because it describes *Beck* as the Supreme Court's "most recent pronouncement in this area," 41 F.3d at 1535, and then later states that *Beck* has nothing to do with "what language is permissible in a union security agreement." 41 F.3d at 1539. The failure to see the consistency in these statements further evidences Plaintiff's misinterpretation of *Beck*. *Beck* still is the most recent Supreme Court case on this issue, holding that "§ 8(a)(3) does not oblige employers 'to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.' " 41 F.3d at 1535 (quoting *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648-49). Yet there is a crucial difference between what the union actually enforces against employees and what language in a collective bargaining agreement is facially valid. *Beck* did not reach the

latter issue. *IUE* is not, as Plaintiff suggests, "poorly reasoned and internally inconsistent," but is an accurate application of the *Beck* holding.

Plaintiff cites a recent Eighth Circuit case, *Bloom v. National Labor Relations Board*, 30 F.3d 1001 (8th Cir.1994), for his position that the union security clause should be stricken from the agreement. The union security clause at issue in *Bloom* reads as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

Bloom v. National Labor Relations Board, 30 F.3d 1001, 1002 (8th Cir.1994). The court in *Bloom* noted that the Union did not advise Bloom that he could object to having union dues and fees spent on nonrepresentational activities and be charged only the percentage spent on representational activities. *Id.* "Instead, Local 12 advised Bloom that the collective bargaining agreement required that he be a member of the union and that if he did not complete the membership application and the dues checkoff card Local 12 would request that Group Health terminate him." *Id.* The Eighth Circuit concluded that, "[b]ecause the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in this case requires expunction of the offending clause." *Id.* at 1004.

The facts in *Bloom* are inapposite to those in the present case. Key to the Eighth Circuit's decision was the fact that the Union did not advise Bloom that he could object to having his dues spent on nonrepresentational activities. In the case at hand, Nielsen was advised by the Union of his right to object and the

procedures for objecting. The clause was expunged in *Bloom* because the Eighth Circuit found that it was "unlawfully **[1102]** interpreted and applied" by the Union. In the present case, the clause was not unlawfully interpreted and applied. Contrary to Plaintiff's contentions, *Bloom* is not applicable to this case.

Additionally, *Price v. Auto Workers Local 571*, 927 F.2d 88 (2nd Cir.1991), does not support Nielsen's position. In *Price*, the Second Circuit concluded that the Union did not violate its duty of fair representation because post-*Beck* procedures implemented by the Union were "more than adequate" to meet the fair representation standard: the procedures employed were not arbitrary, discriminatory, or implemented in bad faith. 927 F.2d at 92. *Price* did not address the facial validity of the union security agreement, and Nielsen's attempt to cite *Price* for such a proposition is not well-taken. Moreover, in *Price*, the Second Circuit affirmed a judgment *dismissing* the dues objectors' claims, and left intact and enforceable the union security clause, a conclusion that hardly supports Nielsen's claims.

Finally, Plaintiff cites *NLRB v. Manitowoc Engineering Co.*, 909 F.2d 963 (7th Cir.1990), in support of his position that the clause in the union security agreement is facially invalid because it overstates the maximum obligation that may be required of employees. The collective bargaining agreement in *Manitowoc* required employees who were promoted to supervisor status to maintain union membership (or obtain a withdrawal card) in order to preserve the right to return to work in the bargaining unit with the seniority that accrued during their earlier employment. 909 F.2d at 963. The Seventh Circuit affirmed the NLRB's conclusion that the agreement was invalid on its face because § 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 909 F.2d at 967 (quoting 29 U.S.C. § 158(a)(3)). The NLRB found that with respect to seniority and employment,

the agreement "mandates disparate treatment with respect to employment for employees returned to the bargaining unit on the basis of whether or not those employees made the required acquisition." 909 F.2d at 963. The NLRB further found that this disparate treatment encourages union membership. *Id.* The Seventh Circuit held that "nothing seems more reasonable than the Board's conclusion that the distinction created by [the agreement] results in disparate treatment—discrimination—in regard to protected employment (and protected employees)." 909 F.2d at 969.

Manitowoc is distinguishable from the present case and does not support Nielsen's position. The union security agreement clause here has to do with dues requirements, while the portion of the agreement at issue in *Manitowoc* dealt with the unique situation where an employee of the bargaining unit was promoted out of the unit and the steps the employee needed to take (while not a member of the unit) in order to retain seniority upon re-entering the unit. In addition, the union security clause at hand does not cover individuals who are no longer represented by the Union, and it does not require membership in the union as a condition precedent to the retention of previously accrued seniority rights. Therefore, *Manitowoc* does not support the plaintiff's position.

In sum, the union security agreement clause is not facially invalid. Nothing in the language of § 8(a)(3) or in the case law supports the plaintiff's proposition that the clause is illegal on its face. Therefore, plaintiff's claim of an allegedly facially invalid union security agreement must be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, Mercy Ambulance's Motion to Dismiss is GRANTED.

APPENDIX E

JEFFREY L. NIELSEN'S LETTER TO

BECKY SMITH, PRESIDENT,

IAM DISTRICT NO. 113/LOCAL LODGE 2569

July 5, 1994

2307 Berkley Avenue
Fort Wayne, Indiana 46815
July 5, 1994

Ms. Becky Smith, President
International Association of Machinists and Aerospace Workers
District No. 113/ Local Lodge 2569
2612 Taylor Street
Fort Wayne, Indiana 46802

Ms. Smith:

In accordance with the U.S. Supreme Court's decision in Patternmakers v. NLRB, I hereby resign as a member of the International Association of Machinists, effective immediately.

Under the U.S. Supreme Court's decision in Communications Workers of America v. Beck, I hereby declare myself protected by financial-core status as defined in the aforementioned decision of the U.S. Supreme Court.

Please return any reduced dues owed to me, and charge me for the new appropriate amount in compliance with the requirements of Beck.

Sincerely,

/s/
Jeffrey L. Nielsen
Paramedic
Mercy Ambulance of Fort Wayne, INC.

APPENDIX F

IAM LOCAL LODGE 2569 PRESIDENT

REBECCA SMITH'S LETTER TO

JEFFREY L. NIELSEN

July 22, 1994

International Association of Machinists and Aerospace Workers
Local Lodge 2569
[Union seal omitted]
2612 Taylor Street
PHONE 219/432-7910
FORT WAYNE, INDIANA 46804

July 22, 1994

Jeffrey L. Nielsen
2307 Berkley Ave.
Fort Wayne, IN 46815

Dear Mr. Nielsen:

I received your letter of July 5, and I am disappointed that you have decided to resign from the IAM. However, that is your right, and your resignation is accepted, effective July 5.

Under the IAM's policy on financial core status, a copy of which you received in your last December's Machinist, requests for fee reduction status must be filed during the month of January, or within the first 30 days you are covered by a new union security agreement. For your information, we enclose a copy of that policy. As that policy indicates, such requests must also be sent by mail to the International Union's General Secretary Treasurer. That being so, I am in no position to act on your request to become a fee objector. If you wish to pursue this matter further, I suggest you take the matter up with the General Secretary Treasurer directly.

Please let me know if I can be of further assistance.

Sincerely,

/s/
Rebecca S. Smith,
President
I.A.W. & A.W. Local 2569
2612 Taylor Street
Fort Wayne, IN 46802

enclosure

APPENDIX G

JEFFREY L. NIELSEN'S LETTER TO DONALD E. WHARTON, GENERAL SECRETARY-TREASURER OF THE IAM

August 16, 1994

CERTIFIED MAIL-- (Solely to comply with IAM's illegal procedure)

Mr. Donald E. Wharton, General Secretary-Treasurer
International Association of Machinists
9000 Machinists Place
Upper Marlboro, MD. 20772-2687

Dear Sir:

I have just resigned from the IAM and its Local 2569. I sent my objection letter to the Local union simultaneously with my resignation letter, but I was referred to you!

I hereby notify you that I wish to be a "financial core objector" only, in accordance with the Supreme Court's decision in CWA v. Beck, 108 S.Ct. 2641 (1988).

I object to the collection, as well as the use, of any of my money for any purposes other than paying my pro rata share of your direct expenses for fulfilling your limited statutory duty under § 9 (a) of the NLRA to engage in collective bargaining, contract administration and grievance processing for the unit of employees at in which I am employed. I object to any and all agency fee calculations that you make.

Prior to collecting any fees from me, you and all of your affiliates must provide me with an independent CPA's verification of the basis for any chargeable vs. nonchargeable allocation for any fee, a reasonably prompt opportunity to challenge the fee before a truly impartial and mutually selected decisionmaker, and an escrow of all amounts that I dispute while my challenge is pending. In addition, your initial calculation and collection must be reduced by the amount the independent CPA's audit shows to

be in excess of actual collective bargaining costs in my specific bargaining unit.

Signature /s/

Name Jeffrey L. Nielsen

Address 2307 Berkley Avenue

Fort Wayne, IN 46815

Date August 16, 1994

cc: Rebecca Smith, IAM Local 2569 (by regular mail)

APPENDIX H

IAM GENERAL SECRETARY-TREASURER

DONALD E. WHARTON'S LETTER TO

JEFFREY L. NIELSEN

August 24, 1994

[Union seal omitted]

International Association of Machinists and Aerospace Workers

9000 Machinists Place
Upper Marlboro, Maryland 20772-2687

Area Code 301
967-4500

OFFICE OF THE GENERAL SECRETARY-TREASURER

August 24, 1994

Mr. Jeffrey L. Nielsen
2307 Berkley Avenue
Fort Wayne, Indiana 46815

Dear Mr. Nielsen:

We are in receipt of your letter dated August 16, 1994 in which you attempted to perfect an objection to the amount of dues or fees you are being required to pay to the International Association of Machinists and Aerospace Workers.

We must advise that your objection was not properly perfected under the guidelines set forth in the Official Notice in the December, 1993 issue of The Machinist.

/X/ Your request that your monthly payment be reduced was not postmarked or received during the appropriate 30 day period.

/_/ Your request was not in the form of an individually sent certified letter.

/_/ Your request was unsigned.

/_/ Your request was not sent to the General Secretary-Treasurer by certified mail.

/_/ Other: _____

Fraternally yours,

/s/
Donald E. Wharton
General Secretary-Treasurer

DEW/lp

cc: Downing, GVP
LL 2569